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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1963~~ 1964

No. ~~727~~ 23

FILIPPO GIOVA, ETC., PETITIONER

vs.

GEORGE K. ROSENBERG, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION SERVICE, LOS ANGELES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 5, 1963
CERTIORARI GRANTED JANUARY 6, 1964

Supreme Court of the United States

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[fol. A] [File Endorsement Omitted]

[fol. 1]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17655

FILIPPO GIOVA, aka PHILIP GIOVA and aka PHILIP CALEO, PETITONER

vs.

GEORGE K. ROSENBERG, District Director of Immigration and Naturalization Service at Los Angeles, California, RESPONDENT

PETITION FOR REVIEW—filed November 30, 1961

Petitioner alleges:

I

Jurisdiction of the above entitled matter is invoked under the provisions of Public Law 87-301 (75 Stat. 650), effective October 26, 1961; under the Administrative Procedure Act, 5 USC, sec. 1000, et seq., for declaratory judgment under the Declaratory Judgment Act, 28 USC, sec. 2201, and for judicial review of the Processes of the Immigration and Naturalization Service.

[fol. 2]

II

The respondent, George K. Rosenberg, is the District Director of Immigration and Naturalization Service at Los Angeles, California.

III

Petitioner was born on April 20, 1913 at Bari, Italy; entered the United States lawfully in the year 1920 when

approximately 6 years of age, and has lived and resided in the United States since said entry except for the periods mentioned in this petition. Petitioner is now 49 years of age, attended elementary and junior high school in the City of Los Angeles, and was married to Lena Smaldino, a native born citizen of the United States, on July 2, 1933. Of this marriage three chree children were born, all citizens of the United States. Petitioner is the grandfather of six native born citizens of the United States. Petitioner and his wife have lived and resided together as husband and wife in the City of Los Angeles, except for the periods of separation as a result of petitioner's deportation from the United States as hereinafter detailed.

IV

On June 8, 1946 petitioner was deported from the United States on the grounds that he had been twice sentenced for a term of one year or more for conviction in California of crimes involving moral turpitude, to wit: second degree robbery on July 15, 1935, and forgery on April 15, 1938, both of which sentences were served concurrently.

[fol. 3]

V

On November 7, 1948 petitioner reentered the United States as a stowaway and was excluded and deported therefrom on June 21, 1949. On October 21, 1952 petitioner reentered the United States at San Ysidro, California, and was deported from the United States in January of 1953. Petitioner reentered the United States and has resided therein since December 24, 1954, with his family, children and grand-children.

VI

On April 2, 1957, petitioner was ordered deported from the United States under the provisions of section 242(f) of the Immigration and Nationality Act.

VII

On June 30, 1959, plaintiff was granted a waiver of grounds of excludability under section 5 of the Act of September 11, 1957.

VIII

The District Director of Immigration at Los Angeles approved petitioner's application for advance permission to reapply for admission to the United States after deportation on June 16, 1959, and on July 27, 1959 amended his order of June 16, 1959, as follows:

"Advance permission to reapply after deportation is granted following departure to Canada under an order of deportation and return under preexamination proceedings approximately in August, 1959."

[fol. 4]

IX

On June 30, 1959, in a decision rendered by the special inquiry officer of the Immigration Service, it was determined:

"* * * that the evidence of record, including the independent investigation conducted by the Service, satisfactorily establishes that the applicant has successfully reformed and genuinely rehabilitated himself and that the applicant's admission to the United States would not be contrary to the national welfare, safety or security of this country. In the premises, a waiver of the ground of excludability is warranted, and, accordingly, consent will be granted the applicant to apply for an immigrant visa and for admission to the United States.

"ORDER: It is ordered that pursuant to the authority contained in Section 5 of the Act of September 11, 1957, permission is granted to apply or reapply for a visa and admission to the United States, notwithstanding his inadmissibility under section 212 (a) (9) of the Immigration and Nationality Act aris-

ing from his convictions in California of robbery, second degree (1935) and forgery (1938) PROVIDED that such waiver shall apply only to the grounds of excludability herein discussed. It is further ordered that the applicant be found admissible to the United States when in possession of "ap-
[fol. 5] propriate documents."

X

That upon the granting of said waiver of excludability, petitioner did make his application for a visa to the United States Consulate at Vancouver, British Columbia, and thereafter on September 9, 1959, petitioner was advised by said Consulate that:

> "You are inadmissible to the United States under the provisions of section 223(a)(23) of the Immigration and Nationality Act",

and denied petitioner's application for a visa.

XI

Petitioner initiated proceedings and caused a petition to be filed with the Court of Appeals at Genoa, Italy, for rehabilitation and expungement of his record from the judgment of conviction entered in the Court of Appeals of said Court on November 21, 1952, following petitioner's conviction of clandestine commerce, and on July 14, 1961, the said Court of Appeals at Genoa, Italy, after due consideration of the record of said proceedings of petitioner, together with the recommendation of the District Attorney of the District of Genoa, Italy, the Chancelor Section Chief of the Court of Appeals granted petitioner's petition for rehabilitation and expungement of accessory punishment and from other legal effects of the conviction of petitioner. That attached hereto and made a part hereof is a duly authenticated copy of the order of the
[fol. 6] Court of Appeals of Genoa, Italy, expunging petitioner's conviction and the penal effects thereof under Articles 178 and 598 of the Criminal Code and Code of

Criminal Procedure of the Republic of Italy, marked Exhibit "A". That attached hereto and made a part hereof is a copy of the Penal Code of the Kingdom of Italy, duly authenticated and certified by Norberta Luning, Public Stenographer, Law Library Building, Los Angeles, California, marked Exhibit "B".

XII

That on September 25, 1961, petitioner filed with the District Director of the Immigration Service at Los Angeles, his supplemental petition (1) to reopen proceedings; (2) for waiver of grounds of excludability under Section 5 of the Act of September 11, 1957, as amended; (3) for leave to file application for suspension of deportation; and (4) for stay of deportation. That a copy of said petition is hereto attached, made a part hereof, and marked Exhibit "C".

XIII

That on November 3, 1961, the Board of Immigration Appeals made and entered its order denying petitioner's petition of September 25, 1961; that a copy of said decision is hereto attached, made a part hereof, and marked Exhibit "D".

[fol. 7] That said Immigration Service and said Board of Immigration Appeals erroneously determined:

(1) That the expungement and pardon of the Court of Appeals of Genoa, Italy, on July 14, 1961 has no legal effect nor applicable to petitioner's application for waiver of grounds of excludability.

(2) That petitioner was not legally eligible for the waiver of grounds of excludability under Section 5 of the Act of September 11, 1957, as amended.

(3) That petitioner was not legally eligible for and in denying him leave to file application for suspension of deportation.

(4) In denying petitioner's petition to reopen the immigration proceedings.

(5) In determining that petitioner was not eligible for any discretionary relief from deportation.

(6) That said Immigration Service and said Board of Immigration Appeals abused its discretion in its determination that petitioner was not entitled to the benefits of the remedial sections of the Immigration Act and not eligible for suspension of deportation and relief under Section 5 of the Act of September 11, 1957, as amended.

WHEREFORE, petitioner prays:

That he be granted a waiver of the grounds of excludability, or, in the alternative that he be granted permission to file an application for suspension of deportation, and for such other and further relief as may be commen-
[fol. 8] surate with this petition.

David C. Marcus
DAVID C. MARCUS
Attorney for Petitioner

[fol. 9]

[Duly sworn to by Filippo Giova jurat omitted in printing (all in italics)]

[fol. 10] EXHIBIT "A" TO PETITION FOR REVIEW

TRANSLATION
REPUBLIC OF ITALY
THE COURT OF APPEAL OF GENOA

composed of the undersigned Magistrates sitting in the Council Chamber.

Having examined the petition presented by GIOVE FILIPPO, son of Giovanni and Nigro Agnese, born on April 21, 1913 in Canneto, Bari, and residing c/ Attorney G. Manara, Via Malta 8, to obtain the rehabilitation from the following judgment:

11/21/1952—Court of Appeal of Genoa—Clandestine commerce eight months of imprisonment and a fine of 5667 Lire.

Having examined the enclosed documents.

Having examined the conclusions of the District Attorney who has expressed a favorable opinion.

Having considered that nothing stands in the way of the acceptance of the petition.

P.Q.M.

Having examined articles 178 and following of the Criminal Code 598 and following of the Code of Criminal Procedure, provisions 44 and 45 D. L. N. 602 of May 28, 1931.

PRONOUNCES, FOR ALL LEGAL PURPOSES, THE REHABILITATION OF GIOVE FILIPPO

Genoa, 7/14/1961

[fol. 11]

The President—F. Vistoso

Counselors —F. Casagli
—E. Cenyonze
—F. Gallerani
—F. Siccardi

The Chancelor
F. Monticone

This copy is similar to the original.

Genoa, 18 July 1961

Chancellor Section Chief
Dr. Giovanni Monticone

OFFICE OF THE DISTRICT ATTORNEY OF GENOA

The signature of Chancellor Dr. Giovanni Monticone is verified as authentic Genoa, 24 July 1961.
The District Attorney, Dr. Vital Sosi.

I, the undersigned, Vito Roppo, knowing the English and Italian languages, certify that the above is the correct translation of the original document written in Italian.

Vito Roppo
VITO ROPPO, Notary Public

My Commission Expires July 6, 1963

[fol. 12]

EXHIBIT "B" TO PETITION FOR REVIEW

I certify that the attached photocopies of the Title Page and pages 13, 14, 50 and 161 of the 1931 Penal Code of the Kingdom of Italy, are true and correct copies of said pages.

Dated: August 9, 1961.

/s/ Norberta Luning
NORBERTA LUNING, Public Stenographer
Law Library Building
301 West First Street
Los Angeles 12, California

[fol. 13] Italy. Laws, statutes, etc.

[SEAL]

FOREIGN OFFICE

PENAL CODE OF THE KINGDOM OF ITALY

As approved by Royal Decree of October 19, 1930

(In force from July 1, 1931)

LONDON:

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[fol. 14] ARTICLE 42.

(Responsibility for Criminal Intent, Culpable Negligence or Preterintentional Crime: Objective Responsibility.)

No one may be punished for an act or omission deemed by the law to be an offense unless he has committed it knowingly and wilfully.

No one may be punished for an act deemed by the law to be a crime unless he has committed it with criminal intent, except in cases of preterintentional crimes or crimes without criminal intent which are expressly contemplated by the law.

The law determines the cases in which the event is otherwise placed to the account of the agent, as a consequence of his act or omission.

In regard to contraventions, each person is answerable for his own knowing and wilful act or omission, whether it be with or without criminal intent.

ARTICLE 43.

(Psychological Element in Offences.)

A crime—

is wilfully malicious, or intentional, when the injurious or dangerous occurence which is the result of the act or omission and upon which the law bases the existence of the crime is foreseen and desired by the agent as a consequence of his act or omission:

is preterintentional, or beyond the intention, when an injurious or dangerous occurrence is derived from the act or omission which is more serious than the one desired by the agent:

is without criminal intent, or against the intention, when the occurrence, even if foreseen, is not desired by the agent and takes place in consequence of negligence, imprudence, unskilfulness, or non-observance of laws, regulations, orders or instructions.

The distinction between an offence committed with and one committed without criminal intent, which is laid down by this Article in respect of crimes, applies also to con-

traventions whenever the law makes any juridical effect dependent on such distinction.

ARTICLE 44.

(Objective Condition of Punishability.)

When the law requires the existence of a condition in order to render an offense punishable, the guilty person shall be responsible for the offense even though the event upon which the existence of the condition depends is not desired by him.

[fol. 15]

ARTICLE 45.

(Accident or Force Majeure.)

Whoever has committed an act through accident or *force majeure* is not punishable.

ARTICLE 46.

(Physical Compulsion.)

Whoever has committed an act, having been compelled to do so by others by means of physical violence which he could not resist or from which he could not in any way escape, is not punishable.

In such case the person who employed the violence shall be responsible for the act committed by the person constrained.

ARTICLE 47.

(Error of Fact.)

An error as to the fact which constitutes an offence shall exclude the agent's liability to punishment. Nevertheless, in the case of an error committed through culpable negligence, liability to punishment is not excluded when the fact is deemed by the law to be a crime committed without criminal intent.

An error regarding a fact constituting a particular offence does not exclude liability to punishment in respect of a different offence.

An error concerning a law other than the penal law excludes liability to punishment when it has caused an error as to the fact which constitutes the offence.

ARTICLE 48.

(Error caused by Deceit of Another.)

The provisions of the preceding Article shall also apply if the error as to the fact which constitutes the offence is caused by the deceit of another person: in this case, however, the individual who has induced the deceived person to commit the act is answerable for the same.

ARTICLE 49.

(Offence Erroneously Presumed and Impossible Offence.)

A person who commits an act which does not constitute an offence, under the erroneous impression that it does constitute an offence, is not punishable.

Liability to punishment is likewise excluded when, owing to the unsuitability of the act or the non-existence of the object thereof, the injurious or dangerous occurence is impossible.

If in the cases contemplated in the preceding provisions the act comprises the constitutive elements of a different [fol. 16] offence, the fourths of the punishment if he is a relapsed individual, and has given constant evidence of good conduct, may be granted conditional release if the remainder of the punishment does not exceed 5 years.

The grant of conditional release is subordinated to the fulfilment of the civil obligations arising from the offence, unless the convicted person proves that he finds it impossible to fulfil them.

Conditional release shall not be granted if, after the punishment has been served, the convicted person has to be subjected to a detentive police measure.

ARTICLE 177.

(Revocation of Conditional Release or Extinction of the Punishment.)

Conditional release is revoked if the person released commits a crime or a contravention of the same nature, or transgresses the obligations attached to supervised liberty, ordered in accordance with Article 230, No. (2). In such case, the time passed in conditional liberty is not reckoned in the duration of the punishment and the convicted person may not again be granted conditional release.

The full period of the punishment inflicted having elapsed without the occurrence of any ground for revocation of the conditional release, the punishment shall be extinguished and the personal police measures ordered by the judge in the sentence or by a subsequent measure shall be revoked.

ARTICLE 178.

(Rehabilitation.)

Rehabilitation extinguishes the accessory punishments and every other penal effect of the conviction, unless the law provides otherwise.

ARTICLE 179.

(Conditions for Rehabilitation.)

Rehabilitation in granted when 5 years have elapsed from the day on which the principal punishment was executed or was, in any other way extinguished, and the convicted person has given effective and constant evidence of good conduct.

The period is 10 years in the case of relapsed persons, as contemplated in paragraphs 2 to 4 of Article 99.

The period is likewise 10 years in the case of habitual or professional delinquents or delinquents by tendency, and it shall run from the day of revocation of the order of assignment to an agricultural colony or a labour establishment.

Rehabilitation may not be granted when the convicted person—

(1) Has been subjected to a police measure, except in the case of the expulsion of a foreigner from the State, or confiscation, and the order has not been revoked.

[fol. 17] ARTICLE 597.

(Denunciation by the Injured Party and Extinction of the Offence.)

The crimes contemplated in Articles 594 and 595 are punishable on action being initiated by the injured party.

If the injured party and the person who committed the injury have availed themselves of the faculty specified in the second paragraph of the preceding Article, the initiation of the action shall be deemed to be tacitly renounced or remitted.

If the offended party dies before the expiration of the period fixed for the initiation of the action, or in the case of an offence against the memory of a deceased person, an action may be initiated by the near relatives, a person who has adopted, and one who has been adopted by the deceased. In such cases, and also if the offended person dies after initiating the action, the faculty specified in the second paragraph of the preceding Article shall lie with the near relatives, the person who has adopted and the one who has been adopted by the deceased.

ARTICLE 598.

(Offending Matter in Writings and Speeches delivered before the Judicial or Administrative Authorities.)

Offending matter contained in documents submitted or in speeches delivered by the parties or by their counsel in proceedings before the judicial authorities, or before an administrative authority, when the offending matter concerns the subject of the action or of the administrative application, is not punishable.

When delivering sentences in the action the judge may, in addition to disciplinary measures, order, wholly or in part, the suppression or cancellation of the offending writings and assign to the offended party a sum by way of

compensation for nonpatrimonial damages. In the case of written matter whose suppression or cancellation cannot be effected the fact of the sentence shall be endorsed on the same.

ARTICLE 599.

(Retort and Provocation.)

In the cases contemplated in Article 594, if the offences are reciprocal, the judge may declare one or both the offenders not to be punishable.

A person who has committed any of the acts contemplated in Articles 594 and 595 in a state of anger caused by an unjust act of another person, and immediately after the same, is not punishable.

The provisions of the first paragraph of the present Article shall also apply to an offender who has not lodged an action in respect of insults received.

[fol. 18]

EXHIBIT "C" TO PETITION FOR REVIEW

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION & NATURALIZATION SERVICE

File No. A 5 206 525

IN THE MATTER OF
FILIPPO GIOVA, also known as PHILIP GIOVA and PHILIP CALEO, PETITIONER

SUPPLEMENTAL PETITION (1) TO REOPEN PROCEEDINGS; (2) FOR WAIVER OF GROUNDS OF EXCLUDABILITY UNDER SECTION 5 OF THE ACT OF SEPTEMBER 11, 1957, AS AMENDED; (3) FOR LEAVE TO FILE APPLICATION FOR SUSPENSION OF DEPORTATION, AND (4) FOR STAY OF DEPORTATION.

Petitioner, Filippo Giova, also known as Philip Giova and Philip Caleo, was born April 20, 1913, at Bari, Italy, and was legally and lawfully admitted to the United States in the year 1920 when he was six years of age. Your petitioner is now 48 years of age and has lived and resided in the United States continuously since the date of his admission until the date of his deportation on June 8, 1946 on the grounds that he had been sentenced to imprisonment for one year or more for crimes involving moral turpitude, to wit: for robbery, second degree and forgery, since his admission. The conviction for robbery, second degree, occurred on July 15, 1935 and for forgery on April 15, 1938.

Petitioner reentered the United States as a stowaway on November 7, 1948, following which he was excluded [fol. 19] and deported to Italy on November 21, 1949.

Petitioner reentered the United States on September 21, 1952. On January 30, 1953 petitioner entered Canada and last returned to the United States about December of 1953, and has resided here continuously since said time.

Petitioner was again ordered deported on April 2, 1957. He was granted the privilege of preexamination on May 4, 1959 and on June 16, 1959 was granted advance permission to reapply for admission to the United States in connection with his deportation, which would result from your petitioner's entrance into Canada to obtain an immigration visa.

Hearings were conducted before the Service and on June 30, 1959 a decision was rendered in connection with his petition for waiver, which granted your petitioner the relief requested. A copy of the decision of the special inquiry officer is hereto attached, marked Exhibit "A".

During the proceedings petitioner advised the special inquiry officer that approximately in the year 1950, in Genoa, Italy, he and several others, who were sharing an apartment, were arrested because one of said persons was suspected of unauthorized possession of a drug. As your petitioner did not serve any time on the charge he verily believed that the proceedings had been dismissed against him and so advised the special inquiry officer. Thereafter, your petitioner made application to the United States Consulate at Vancouver, British Columbia, for a visa. Thereafter, and on September 9, 1959 petitioner received a communication from the United States Consul [fol. 20] at Vancouver, advising him that he was inadmissible to the United States under the provisions of section 212(a)(23) of the Immigration and Nationality Act.

Your petitioner did thereupon cause an investigation to be made and a search of the records to ascertain the nature of the proceedings upon which the Consul at Vancouver denied his application. He was thereupon informed by competent legal authority that the record could be expunged and all penal effects thereof extinguished under Articles 178 and 179 of the Criminal Code of the Republic of Italy and section 598 et seq. of the Code of Criminal Procedure.

Thereupon your petitioner caused a petition to be made to the Court of Criminal Appeals of Genoa, Italy, for rehabilitation under the corresponding criminal code for the purpose of extinguishing the penal effects of the conviction. On the 18th day of July, 1961, upon the recom-

mendation of the District Attorney of Genoa, Italy, the Chancelor Section Chief of the Court of Appeals of Genoa granted your petitioner's petition of rehabilitation and extinguished all accessory punishments and every other legal effect of the conviction of your petitioner. That attached hereto and made a part hereof is a duly authenticated and legalized copy of the order of the Court of Appeals of Genoa, Italy, expunging your petitioner's conviction and extinguishing all effects thereof under Article 178 and 598 of the Criminal Code and Code of Criminal Procedure of the Republic of Italy, marked Exhibit "B". Also attached hereto and made a part hereof is a copy [fol. 21] of the Penal Code of the Kingdom of Italy, duly authenticated and certified by Norberta Luning, Public Stenographer, Law Library Building, 301 West First Street, Los Angeles, California, marked Exhibit "C".

Your petitioner attended elementary and junior high school in the City of Los Angeles. He was married to Lena Smaldino on July 2, 1933, she being a native born citizen of the United States. This was the first marriage of your petitioner and his wife, neither having been previously married. Of this marriage three children were born, all in the United States and citizens thereof, namely, Agnes Giova Pectol, now 28 years of age, married and has four children; John Giova, now 26 years of age, married and has two children, and Frank Giova, now 20 years of age, who lives with petitioner and his wife.

Petitioner and his wife have resided together since their marriage, except for the separation resulting from your petitioner's imprisonment and deportation from the United States. His wife is totally dependent upon him for support and maintenance. Petitioner and his wife have lived together since the date of his last entry into the United States in the year 1953. There has been no divorce and or separation contemplated. Petitioner resides at 5922 Hereford Drive, Los Angeles, California, where he has resided with his family continuously during the past 8 years.

Petitioner hereby incorporates herein and makes a part hereof by reference his previous petition filed with the

[fol. 22] Department on May 25, 1961, together with all appropriate documents used in connection therewith.

WHEREFORE, your petitioner prays:

(1) that he be granted a waiver of the grounds of excludability, or, in the alternative,
(2) that he be granted permission to file an application for suspension of deportation;
(3) for stay of deportation, and,
(4) for such other and further relief as may be commensurate with this petition.

Dated this 25th day of September, 1951.

Filippo Giova, aka
Philip Giova and Philip Caleo,

By David C. Marcus
DAVID C. MARCUS
Attorney for Petitioner.

[fol. 23]

EXHIBIT "D" TO PETITION FOR REVIEW

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

November 3, 1961

File: A-5206525—Los Angeles
In re: FILIPPO GIOVA aka PHILIP GIOVA and PHILIP CALEO

IN DEPORTATION PROCEEDINGS:

MOTION

ON BEHALF OF RESPONDENT:

David C. Marcus, Esquire
215 West Fifth Street
Los Angeles, California

CHARGES:

Order: Section 242(f), I&N Act—Unlawfully reentered after deportation on criminal ground (8 USC 1252(f))
Lodged: None

APPLICATION: Reopening

This case comes forward pursuant to respondent's motion submitted through counsel at Los Angeles office of the Service on September 25, 1961 asking that the proceedings be reopened so that the respondent may be granted waived of a ground of excludability as provided in Section 212(g) of the Immigration and Nationality Act, as amended, or, in the alternative, for suspension of deportation under Section 244 of the Immigration and Nationality Act and that his deportation be stayed.

The respondent, a 49 years old married male, native and citizen of Italy, resided continuously in the United States from 1920 until his deportation therefrom on June [fol. 24] 8 1946 under the Act of 1917, as amended, on the ground that he had been twice sentenced to imprison-

ment for a term of one year or more for conviction in California of crimes involving moral turpitude, to wit, robbery, second degree, and forgery on July 15, 1935 and April 15, 1938, respectively. The respondent was never granted permission to reapply for admission after arrest and deportation until June 1959. The respondent next entered the United States as a stowaway on November 7, 1948 and he was excluded and deported therefrom to Italy on January 21, 1949. He reentered the United States surreptitiously from Mexico at San Ysidro, California on October 21, 1952 and he was again deported from the United States to Canada in January 1953. He has resided continuously in the United States since last entering at Blaine, Washington on or about December 24, 1954.

When this case was first before this Board on September 16, 1957, we dismissed the appeal from an order entered by the special inquiry officer on April 2, 1957 directing that the respondent be deported from the United States pursuant to law on the charge designated above. The respondent's application for waiver of excludability under Section 5 of the Act of September 11, 1957 was granted by a special inquiry officer on June 30, 1959. The District Director of Immigration and Naturalization approved the respondent's application for advance permission to reapply after deportation on June 16, 1959 and on July 27, 1959 the District Director amended his order of June 16, 1959 to read as follows: "Advance [fol. 25] permission to reapply after deportation is granted following departure to Canada under an order of deportation and return under preexamination proceedings approximately in August 1959." The record shows that the respondent's application for an immigrant visa was denied by the United States Consulate at Vancouver, Canada under the provisions of Section 212(a)(23) of the Immigration and Nationality Act by reason of his having been convicted of a narcotic offense in Genoa, Italy during 1950.

When this case was last before this Board on June 12, 1961, we denied the respondent's motion requesting that the proceedings be reopened for the purpose of affording

him an opportunity to apply for and prosecute an application for a waiver of excludability under Section 5 of the Act of September 11, 1957 and for suspension of deportation under Section 244(a) of the Immigration and Nationality Act. It was also urged at that time that the proceedings be reopened for the purpose of testing and establishing the validity of the denial of the respondent's application for an immigrant visa under Section 212(a)(23) of the Immigration and Nationality Act. The Board's reasons for denuing the aforementioned motion of the respondent dated May 25, 1961 are set forth in detail in our decision of June 12, 1961 and need no further discussion herein.

Counsel in support of the present motion submitted a duly authenticated and legalized copy of an order entered in the Court of Appeals at Genoa, Italy on July 14, 1961. [fol. 26] This document, among other things, states that having examined the petition presented by the respondent through his conusel to obtain the rehabilitation from the judgment entered in the Court of Appeals on November 21, 1952 following his conviction of "clandestine commerce" for which he was sentenced to eight months' imprisonment and fined 5667 lire pronounces, for all legal purposes, the rehabilitation of the respondent in accordance with Articles 178 of the Penal Code of Italy, 598 of the Criminal Code and the provisions of 44 and 45 of the Code of Criminal Procedure. It is unnecessary for us to determine whether the action of the Court of Appeals in Genoa, Italy, on July 14, 1961 expunged the respondent's conviction in the same court on November 21, 1952 inasmuch as the courts of the United States clearly limit pardons and other acts in the nature of a prison or amnesty exclusively to convictions in the United States (cf., Matter of B-, 7 I&N Dec. 166 and Matter of G-5 I&N Dec. 129).

The record relating to the rehabilitation of the respondent entered in the Court of Appeals of Genoa, Italy on July 14, 1961 is the only additional factor in the present motion not heretofore fully considered by this Board. After carefully considering all the evidence of record, together with counsel's representations by brief on motion

and the documents submitted in support thereof, we find nothing therein that would justify a reopening of the proceedings for the purposes requested. It appears that the respondent is ineligible for any form of discretionary [fol. 27] relief. Hence, no purpose would be served in reopening the proceedings. Accordingly, the following order will be entered:

ORDER: It is ordered that the motion be denied.

Chairman.

[fol. 28]

56017/188—San Francisco February 16, 1960.

In re: FILIPPO GIOVE or PHILIP GIOVA.
(Serving sentence).

Before the Board of Review in DEPORTATION proceedings.

In behalf of RESPONDENT: Rev Ettore Di Giantomasso at port.

CHARGE. Act of 1917—Sentenced more than once for crimes involving moral turpitude.

REQUEST: That respondent be not deported.

A sworn statement was taken from this respondent at San Quentin on May 23, 1939, in which he testified that he is a native and subject of Italy, born April 20, 1913; and that he landed in this country at Boston, Massachusetts, in 1920 or 1921 accompanied by his mother and has resided in this country ever since. His mother in a sworn statement taken from her on March 23, 1939, testified that she is a native and citizen of Italy, and that she and her son landed at Boston, Massachusetts, about eighteen years ago.

Information was placed against this respondent in Los Angeles County, California, on July 15, 1935, charging him with the crime of robbery, together with two other defendants, Paul Waroff and Delmer J. Armstrong; which crime was comitted June 22, 1935. The defendant pleaded not guilty, was convicted of the crime of robbery, second degree, and was sentenced to serve a year to life, but the court ordered that proceedings be suspended and each defendent be placed on probation for a period of three years under the following conditions: Defendant Paul Waroff must serve 9 months of his probationary period in the County Jail, and the defendants, Delmer J. Armstrong and Philip Giova, the respondent, must each serve one year of their probationary periods in the County Jail, each to be given credit for good behavior.

On April 15, 1938, information was filed against respondent charging him with forgery in five counts. He

pleaded guilty to forgery in count 1 and the other counts were dismissed, and the defendant having admitted prior conviction for robbery was sentenced to serve one to fourteen years in San Quentin Prison, and on May 23, 1938, [fol. 29] it was ordered that said defendant, having violated the terms of his probation, that the probation heretofore granted is revoked and he be punished by imprisonment for the term prescribed by law, same to run concurrently with the sentence imposed for forgery.

The evidence shows that respondent is an alien and it supports the charge in the warrant of arrest.

Respondent is deportable under Sections 19 and 20 of the immigration Act of 1917. This alien was married on July 2, 1933, in Los Angeles, California, to a native and citizen of this country and they have two American-born children. His mother also resides here with her two children by a second marriage. It is stated that the alien has no relatives in Italy.

The wife of the alien on August 31, 1939, addressed a letter to Governor Olson, pleading that her husband be not deported. This letter was forwarded by the Governor to the Los Angeles immigration office for consideration.

As the case stands, deportation is mandatory under the law unless the alien is pardoned for one of his offenses.

It is recommended that the alien be deported to Italy at Government expense on the charge in the warrant.

Execution of this warrant should be deferred until alien is released from imprisonment.

JLB/CR

/s/ Thos. G. Finucane
Member, Board of Review.

So ordered:
[Illegible]

Received, February 20, 1940, Warrants Division.

[fol. 30]

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

April 2, 1957

File: A5 206 525—Los Angeles

IN RE: FILIPPO GIOVA, aka PHILLIP CALLEO

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: No one

CHARGES:

Order: I&N Act—Sec. 242(f)
Lodged: None

APPLICATION: None

DETENTION STATUS: Confined in Los Angeles County Jail

ORDER TO SHOW CAUSE SERVED: March 29, 1957

ORAL DECISION OF SPECIAL INQUIRY OFFICER

ENTERED ON: April 2, 1957

DISCUSSION AS TO DEPORTABILITY: The above-named respondent having appeared before me for hearing pursuant to an Order to Show Cause, and having admitted that the factual allegations contained therein are true, and having further admitted deportability on the charge(s) set forth therein, I have concluded that respondent's deportability has been thereby established (8 CFR 242.16(b)).

DISCUSSION AS TO ELIGIBILITY FOR DISCRETIONARY RELIEF: The respondent is not eligible for any discretionary relief.

The respondent declined to designate a country of deportation if ordered deported, reserving his right to do so at a future date.

ORDER: It is ordered that the respondent be deported fro mthe United States under the previous order of deportation dated February 16, 1940, in accordance with Section 242(f) of the Immigration and Nationality Act.

I CERTIFY that the foregoing is a correct transcript of my oral decision in this case.

/s/ Louis L. Mattel,
LOUIS L. MATTEL,
Special Inquiry Officer

I CERTIFY that the foregoing is a correct transcript of my shorthand notes of the oral decision in this case.

/s/ Caron Rhodes
CARON RHODES,
Stenographer

[fol. 31]

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

September 16, 1957

File: A-5206525—Los Angeles

In re: FILIPPO GIOVA or PHILLIP CALLEO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Harlin M. Fuller, Esquire
Suite 520 Walter P. Story Building
610 South Broadway
Los Angeles 14, California

CHARGES:

Order: Sec. 242(f), Immigration and Nationality Act (8 USC 1252(f))—Unlawfully reentered after deportation on criminal ground
Lodged: None

APPLICATION: No specific application

This case is before us on appeal from a decision of a special inquiry officer directing the respondent's deportation.

The respondent is a 44-year-old married male, native and citizen of Italy, who last entered the United States about December 27, 1954. He resided in the United States from 1920 or 1921 until June 8, 1946 when he was deported on the ground that he had been twice sentenced to imprisonment for one year or more for the commission of crimes involving moral turpitude. The sole issue is whether the respondent is deportable on the charge stated in the Order to Show Cause.

There is no merit in counsel's contention that the special inquiry officer's order of April 2, 1957 is defective in

that it provides for deportation under the order of deportation dated February 16, 1940 which order of deportation has already been executed. 8 USC 1252(f) specifically provides that in cases such as the instant one the alien shall be deported under the previous order of deportation.

Counsel also contends that the original order of deportation was invalid because there was only one sentence to imprisonment for a term of one year or more. The facts pertaining to the charge under which the respondent was previously deported are as follows. There were two con- [fol. 32] convictions under California law. He and two other defendants were accused of robbery and on August 16, 1935 the respondent was placed on probation for three years and was ordered to serve one year of the probationary period in the county jail. Subsequently he pleaded guilty to a charge of forgery and on April 28, 1938 he was sentenced to imprisonment for the term prescribed by law (1 to 14 years). On May 23, 1938 the court found that the respondent had violated the terms of the probation granted on August 16, 1935 in connection with the robbery charge, revoked the probation, and sentenced him to imprisonment for the term prescribed by law (one year to life), the sentence to run concurrently with that in the forgery conviction.

If there had been only the original order of August 16, 1935 granting probation and directing that one year be served in the county jail, we would be inclined to agree with counsel that this would not constitute a sentence to imprisonment for one year or more. This is in accordance with our decision in *Matter of F-*, 1 I&N Dec. 343 (1942). However, when the respondent's probation was revoked on May 23, 1938 and he was sentenced to imprisonment for the term prescribed by law, there was a sentence to imprisonment for a term of one year or more within the meaning of Section 19(a) of the Immigration Act of 1917 as amended (8 USC 155(a), 1946 Ed.). We need not express an opinion as to whether the respondent is precluded from raising this question in the present proceeding since we hold that there was no in-

validity in the order of deportation dated February 16, 1940. After careful consideration of the record, we conclude that the respondent is deportable on the charge stated in the Order to Show Cause and the appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

/s/ Thos. G. Finucane
Chairman

[fol. 33]

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Los Angeles, California

A5 206 525

May 4, 1959

WB/lfb

Filippo Giova
5922 Hereford Drive
Los Angeles 22, California

Dear Sir:

Your application for the privilege of preexamination for the purpose of facilitating your entry into Canada to secure an immigrant visa with which to reenter the United States lawfully for permanent residence has been granted.

Preexamination cannot be accorded you unless and until you have submitted to the United States Consul, to whom you intend to apply for a visa, the necessary documents in support of your application for a visa and have received from the Consular Officer written assurance that a visa will be promptly available if, upon personal examination by the Consul, you are found to be eligible for a visa. You should then notify this office of that assurance so that an appointment may be made for your preexamination at this office prior to your departure to Canada.

If you qualify for a nonquota or preference quota visa and have not already filed with this Service a visa petition, you should do so immediately.

You will be given until June 30, 1959 to adjust your status in this manner, conditioned upon your appearance at this office WITHIN SIXTY DAYS with evidence, such as copies of correspondence, indicating you are taking steps to obtain an immigrant visa.

You are cautioned that unless you voluntarily depart from the United States within the period specified in this

letter, it will be necessary to institute deportation proceedings against you. If you have already been placed under deportation proceedings and an order has been entered granting you the privilege of voluntary departure in lieu of deportation, failure to depart within the period specified above will result in your deportation pursuant to law without further notice or proceedings.

Arrangements must be made by you with this Service for verification of your departure.

Very truly yours,

Assistant District Director
Travel Control Branch

OFFICIAL COPY TO:

AMERICAN CONSULATE AT Vancouver, Canada
Applicant born April 20, 1913 at Bari, Italy
cc: State Dept.
cc: David C. Marcus, Atty

IT IS IMPORTANT THAT IMMEDIATE STEPS ARE TAKEN TO SECURE AN APPOINTMENT WITH THE AMERICAN CONSUL FOR THE PURPOSE OF OBTAINING A VISA.

JUNE 24, 1959 EXHIBIT "PX1"

fol. 34

Form Approved
Budget Bureau No. 43-R291

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

A 5-700-52

APPLICATION FOR WAIVER OF GROUNDS OF EXCLUDABILITY
Under Section (5), (6), or (7) of the Act of September 11, 1957

(See Conditions for Admission on the reverse)

I, FILIPPO GIOVA residing at 5922 Hereford Drive (Street address) Los Angeles (City or town) California (County) USA,

was born on April 20, 1913 (Date) at Bari (City or town) Italy (State or country).

I applied for a visa at the American Consulate at Vancouver, B. C. (City or town) Canada

on May 27, 1959 (Date). I was declared inadmissible for the following reason(s)

under section 212(a)(9) Immigration Act.

I desire waiver of the above grounds of inadmissibility.

I have the following relatives in the United States:

Jane Giova (Name) Wife (Relationship)
5922 Hereford Drive (Street address) Los Angeles, California (City and State)

James Giova Pectol (Name) Daughter (Relationship)
11824 Cheshire St., (Street address) Norwalk, California (City and State)

Johnny Giova (Name) Son (Relationship)
[illegible] So. Oakford Dr., (Street address) Los Angeles, California (City and State)

Frank Giova Son 5922 Hereford Dr., Los Angeles, C

I was previously in the United States from 1920 (Date) to 1946 (Date)

and from 1952 (Date) to 1953 (Date)

and from 1953 (Date) to date (Date).

May 22, 1959 (Date)

Filippo Giova (Signature of petitioner)

EXHIBIT "A"

JUN 24 1959

Form I-601
(9-11-57)

34

fol. 35

Form approved.
Budget Bureau No. 41-R011.1

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File No. A 5 206 525

Date June 16 1959

APPLICATION FOR PERMISSION TO REAPPLY FOR ADMISSION INTO THE UNITED STATES AFTER DEPORTATION OR REMOVAL
(To be filed in duplicate)

$ 5 | Fee Stamp PAID | No. 244-S
Immi... JUN 16 1959 ...ralization Ser... s. Calif.
Date 6/16/59 Verified by

PILIPPO GIOVA PHILIP GIOVA PHILIP CALEO
(Give any and all complete names that you have used with particular reference to the name used when you were last deported or removed from the United States.)

I am a native of Bari (city or town) Italy (country) and on April 20 1913 (month) (day) (year) was

(Here check mark in the proper block or blocks.)

- ☐ excluded and deported (less than one year ago)
- ☒ arrested and deported
- ☐ removed (after having fallen into distress)
- ☐ removed (as alien enemy)
- ☐ removed (at Government expense in lieu of deportation pursuant to the Immigration and Nationality Act

by the United States on or about June 1946 (date of deportation or removal) to Italy (country to which deported or removed).

I resided in the United States for a period of approximately 26 years, and at the time of deportation or removal I was living in the city or town of Los Angeles (city or town) in the State of California (state).

I ☐ did ☐ did not make application for removal or was given a deportation hearing at Los Angeles, California (city or town).

I ☒ was ☐ was not ☐ detained in a jail or other detention facility at San Pedro, California (city or town).

I departed from the United States from the port of New York, N. Y.

I hereby apply to the Attorney General for permission to reapply for admission to the United States under the applicable provisions of the Immigration laws.

I desire to reenter the United States as a permanent resident (permanent resident or visitor, student, etc.) for the following reasons:

To reside with my wife and children, all of whom are American born citizens

If you have any file number noted on any correspondence from this Service that you may have in your possession. Please attach any correspondence now in your possession that pertains to your deportation.

If my application is granted, I expect to apply to an American consular officer at Vancouver (city or town), Canada (country).

(DO NOT WRITE IN THIS BLOCK)

June 16, 1959 (date)

GRANTED

DENIED for the following reasons:

Paul C. Hoy (District Director)

Los Angeles, California (city and state)

10. Filippo Giova (Applicant sign here)

11. 5922 Hereford Drive (street and number of present residence) ~~75~~

12. Los Angeles, California (city and country of present residence)

EXHIBIT "9X3"

JUN 24 1959

Form I-212
Rev. 12-1-58

SEE INSTRUCTIONS ON REVERSE SIDE

[fol. 36]

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

June 30, 1959

A5 206 525—Los Angeles

In re: FILIPPO GIOVA, also known as PHILIP GIOVA and PHILIP CALEO

IN PREEXAMINATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

David C. Marcus, Esq.
215 West Fifth Street
Los Angeles 13, California

EXCLUDABLE: Sec. 212(a)(9)—I&N Act—Convicted of crimes involving moral turpitude, to wit: Robbery second degree and Forgery

APPLICATION: Waiver of excludability under Section 5 of the Act of September 11, 1957

DISCUSSION: The applicant, a 46-year-old married male, a native and national of Italy, resided in the United States continuously from the time of his entry in about 1920 until his deportation on June 8, 1946, on the ground that he had been twice sentenced to imprisonment for one year or more for crimes involving moral turpitude, namely, robbery second degree and forgery. Both convictions occurred in California. On July 15, 1935, he was convicted of robbery second degree and on April 15, 1938, he was convicted of forgery. The applicant reentered the United States as a stowaway on November 7, 1948, following which he was excluded and deported to Italy on January 21, 1949. He next reentered the United States surreptitiously from Mexico on September 21, 1952. He was ordered deported on January 30, 1953, and executed said order by entering Canada. He last returned to the United States in about December 1953, and on April 2, 1957, he was ordered deported under the provisions of Section

242(f) of the Immigration and Nationality Act. The applicant has been here continuously since his last entry in December 1953.

The applicant was granted the privilege of preexamination on May 4, 1959 (Ex. PX-1) and on June 16, 1959, he was granted advance permission to reapply for admission to the United States in connection with the deportation which would result from his contemplated departure to Canada to obtain an immigrant visa (Ex. PX-[fol. 37] 3). The applicant is clearly excludable from the United States under Section 212(a)(9) of the Immigration and Nationality Act because of his convictions of crimes involving moral turpitude, to wit, robbery second degree and forgery.

DISCUSSION AS TO ELIGIBILITY FOR DISCRETIONARY RELIEF: In order to overcome the above-mentioned ground of excludability, the applicant has applied for a waiver under Section 5 of the Act of September 11, 1957. He has been married to a native-born citizen of the United States since July 2, 1933. Neither the applicant nor his wife was previously married. They have three children, a married daughter 24 years of age, a married son 22 years of age, and another son 16 years of age, all of whom were born in the United States. The applicant and his wife have resided together continuously since their marriage, except for the separations resulting from the applicant's imprisonment and deportations. The applicant and his wife have lived together since his last entry into the United States in 1953, and there is no divorce or separation contemplated.

The applicant's wife, who is 45 years of age, is not employed. Since 1953, the applicant has been self-employed as a buyer and seller of used cars and presently earns approximately $500 per month. The applicant's wife and minor son are totally dependent upon him for support and maintenance. The applicant's assets consist of an equity of about $6,000 in his home and about 20 used automobiles which comprise his stock in trade.

The applicant testified that if he were required to leave the United States his wife would have no way of supporting herself and their minor son. He further stated that his wife would probably have to go to work, and obtain state or county aid. In addition, the enforced separation would be very difficult for him and his family. The wife testified that during all the time that they had resided together the applicant had been a good provider. She declared that if her husband were deported they would lose their home and the family would be broken up. Both the applicant and his wife stated that from time to time the applicant also contributes to the support of their married children and that the relationship between the applicant and all members of his family is excellent. In view of the foregoing, it is concluded that the applicant's wife and their three children would suffer extreme hardship if he were deported.

The applicant has received from the American Consul at Vancouver, B.C., Canada, a communication granting him a tentative appointment for August 19, 1959, to execute a formal application for an immigrant visa. Examination [fol. 38] of the applicant and a review of his file fail to disclose that he is excludable from the United States on any ground other than Section 212(a)(9) of the Immigration and Nationality Act. There is no evidence of any subversive affiliations or sympathies on the part of the applicant or his wife. Since his convictions of robbery second degree (1935) and forgery (1938), his only other convictions were for suspicion of wife beating in December 1952 (sentenced to ten days) and drunk driving in February 1955. With respect to the suspicion of wife beating charge, both the applicant and his wife testified that the arrest resulted from a family argument because of the late hours kept by their daughter and that at no time did the applicant strike his wife. The applicant admitted that in 1950 in Genoa, Italy, he and several others who were sharing an apartment were arrested because one of said persons was suspected of unauthorized possession of a drug. According to the applicant, the charge was dismissed against him and the others. Apart from

the foregoing, a check of the appropriate local and federal agencies fails to reveal any other convictions pertaining to the applicant or his wife. An independent character investigation conducted by this Service is favorable to the applicant and his wife. A recent medical examination of the applicant by the United States Public Health Service discloses that he is not afflicted with any defect, disease, or disability, other than that he is suffering from Class C Diabetes, no disability resulting therefrom.

In light of all of the foregoing, it is concluded that the applicant, as the spouse of a United States citizen, qualifies for non-quota immigrant status; that he has resided in the United States for an aggregate period of over 32 years and received his education here; that his immediate family and all collateral relatives reside in the United States; that he is excludable solely under Section 212(a)(9) of the Immigration and Nationality Act as a result of his convictions of robbery second degree (1935) and forgery (1938); that if said ground of excludability were waived, an immigrant visa would be available to him; that his exclusion would result in extreme hardship to his wife and three children, all of whom are native-born citizens of the United States; that the evidence of record, including the independent investigation conducted by this Service, satisfactorily establishes that the applicant has successfully reformed and genuinely rehabilitated himself; and that the applicant's admission to the United States would not be contrary to the national welfare, safety, or security of this country. In the premises, a waiver of the ground of excludability is warranted and, accordingly, consent will be granted to the [fol. 39] applicant to apply for an immigrant visa and for admission to the United States.

ORDER: It is ordered that pursuant to the authority contained in Section 5 of the Act of September 11, 1957, permission is granted to the applicant, FILIPPO or PHILIP GIOVA, to apply or reapply for a visa and admission to the United States, notwithstanding his inadmissibility under Section 212(a)(9) of the Immigration and Nationality Act arising from his convictions in Cali-

fornia of robbery second degree (1935) and forgery (1938), PROVIDED that such waiver shall apply only to the grounds of excludability herein discussed.

IT IS FURTHER ORDERED that the applicant be found admissible to the United States when in possession of appropriate documents.

/s/ Louis L. Mattel
LOUIS L. MATTEL,
Special Inquiry Officer

LLM:cgr

[fol. 40]

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
LOS ANGELES, CALIFORNIA

July 27, 1959

FILE: A5 206 525

IN RE: FILIPPO GIOVA aka PHILIP GIOVA aka PHILIP CALEO

My order dated June 16, 1959 granting the appellant permission to reapply for admission to the United States after deportation is amended as follows:

"Advance permission to reapply after deportation is granted following departure to Canada under an order of deportation and return under preexamination proceedings approximately in August 1959."

SO ORDERED:

/s/ Richard C. Hoy
RICHARD C. HOY
District Director

July 28, 1959

[fol. 41]

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION & NATURALIZATION SERVICE

No. A 5 206 525

IN THE MATTER OF
FILIPPO GIOVA, also known as
PHILIP GIOVA and PHILIP CALEO
PETITIONER AND RESPONDENT

$25.00 FEE PAID Immigration and Naturalization Service, Los Angeles, Calif., No. 5170-8, FIS., Date 5/25/61, Verified by /S.

PETITION (1) TO REOPEN PROCEEDINGS; (2) FOR WAIVER OF GROUNDS OF EXCLUDABILITY UNDER SECTION 5 OF THE ACT OF SEPTEMBER 11, 1957, AS AMENDED; (3) FOR LEAVE TO FILE APPLICATION FOR SUSPENSION OF DEPORTATION; and (4) FOR STAY OF DEPORTATION.

Petitioner herein, a native and citizen of Italy, born April 20, 1913, at Bari, Italy, first entered the United States lawfully in the year 1920 when he was six years of age. He has resided in the United States continuously since that time except for the periods indicated herein.

Your petitioner attended elementary and junior high school in the City of Los Angeles. He was married to Lena Smaldino on July 2, 1933, she being a native born citizen of the United States. This was the first marriage of your petitioner and his wife, neither having been previously married. Of this marriage three children were born, all in the United States and citizens thereof, namely: Agnes Giova Pectol, now 26 years of age; married and has four children; John Giova, now 24 years of age, who has two children of his marriage; and a son, Frank Giova, now 18 years of age, who lives with petitioner and his wife.

Your petitioner and his wife have resided together since their marriage, except for the separation resulting from your petitioner's imprisonment and deportation from the United States.

[fol. 42] Petitioner's wife and minor son Frank are totally dependent upon him for their support and maintenance. Petitioner and his wife have lived together since the date of his last entry into the United States in the year 1953. There has been no divorce or separation contemplated. Petitioner now resides at 5922 Hereford Drive, Los Angeles, California, where he has resided with his family continuously during the past six years.

Your petitioner was deported from the United States to Italy on June 18, 1946. This deportation was predicated upon your petitioner's conviction on July 15, 1935 of robbery, second degree, and April 15, 1938, of forgery.

On November 4, 1948 your petitioner reentered the United States as a stowaway, following which he was excluded and deported on January 21, 1949.

Your petitioner reentered the United States surreptitiously from Mexico on September 21, 1952 and was ordered deported on January 30, 1953. He entered Canada shortly after the order of deportation, thereby effecting his deportation from the United States.

On May 4, 1959 your petitioner was granted the privilege of preexamination, and on June 16, 1959 was granted advance permission to reapply for admission to the United States in connection with the deportation, which would result from his contemplated departure to Canada, to obtain an immigration visa. Your petitioner received an appointment date from the United States Consulate at Vancouver, British Columbia, Canada, on his application for a visa, requiring his presence and person at the Consulate on August 19, 1959, at 10:00 A. M.

In view of petitioner's convictions, which rendered him excludable from the United States, he filed a petition with the Immigration Service to waive the grounds of excludability under section 5 of the Act of September 11, 1957. [fol. 43] On June 30, 1959, after hearings conducted by a special inquiry officer, it was ordered:

"ORDER: It is ordered that pursuant to the authority contained in Section 5 of the Act of September 11, 1957, permission is granted to the applicant, Filippo Giova or Philip Giova, to apply or reapply for a visa and admission to the United States, notwithstanding his inadmissibility under Section 212 (a) (9) of the Immigration and Nationality Act arising from his convictions in California of robbery, second degree (1935) and forgery (1938), PROVIDED that such waiver shall apply only to the grounds of excludability herein discussed.

IT IS FURTHER ORDERED that the applicant be found admissible to the United States when in possession of appropriate documents.

LOUIS L. MATTEI
Special Inquiry Officer."

Your petitioner received several notices from the United States Consulate at Vancouver, continuing his appointment date and did not depart. On September 9, 1959 he received a communication from the United States Consul advising him that he was inadmissible to the United States under the provisions of section 212(a)(23) of the Immigration and Nationality Act.

Since the year 1957 your petitioner has been under supervisory parole to the Immigration Department and his deportation proceedings have been stayed. However, on May 23, 1961 your petitioner's counsel, David C. Marcus, received a copy of a communication dated May 19, 1961, from the Immigration Service, addressed to the petitioner. Said communication was relayed to the petitioner on May 24, 1961, which advised your petitioner to present himself, ready for deportation, on Monday, May 29, 1961, at the office of the Immigration Service, 510 [fol. 44] South Vermont Avenue, Los Angeles, California.

The original of said communication to your petitioner was received on this 24th day of May, 1961, at 11:00 A. M. by petitioner's wife while your petitioner was in consultation with his counsel at Los Angeles.

Your petitioner alleges that he is not acquainted with the exact nature of the charge and proceedings upon which the United States Consul at Vancouver denied his application for a visa under the provisions of section 212(a)(23) of the Immigration and Nationality Act. Your petitioner verily believes that said charge so suggested by said Consulate does not render him excludable and that the facts and circumstances surrounding the charge upon which the order of excludability was predicated did not constitute an excludable charge under section 212(a)(23). However, your petitioner alleges that he desires a hearing by these proceedings to determine whether or not such order of excludability is a valid exclusionary order, and, if so, for a waiver of the grounds of excludability.

Your petitioner, in support of his application for leave to apply for suspension of deportation respectfully recites:

That he is now 48 years of age; that he has an established home in the United States; that his wife, children, grandchildren, relatives and friends all reside in the United States; that a very close family knit and ties exist between your petitioner and his family and relatives. Your petitioner is engaged in business, and has been for the past 8 years, as a buyer and seller of used automobiles, and from his earnings of approximately $500.00 a month he supports his family and himself. His wife and minor son Frank have no other separate means of support. His youngest son intends to pursue his education. His wife's physical condition is such that she cannot work and has not worked for many years past.

Petitioner owns his home. That in connection with the [fol. 45] operation of his business he is indebted to several banks and finance companies on recourse paper for the financing of the automobiles which he sells from his premises.

If your petitioner were required to depart from the United States his wife and minor son Frank would have no means of support and she, being unable to work, would become a public charge. Petitioner's separation

from his wife and family would result in great, unusual and extreme hardship.

Petitioner, in addition to supporting his wife and minor child, contributes to the support and assistance of his married daughter and married son. Petitioner is indebted on his home to the extent of approximately $7,000.00, which is payable at the rate of $75.00 per month. In addition thereto petitioner has outstanding obligations in the approximate sum of $3500.00.

Your petitioner dearly loves his wife and children and to separate him from them would be worse than death itself.

Petitioner has no near relates or friends in Italy. His wife and children, American citizens, do not desire to depart from the United States. Your petitioner does not desire to depart therefrom. His residence here has extended over a period of 35 years.

By reason of petitioner's long and continued residence in the United States, he verily believes that he is eligible for suspension of deportation and does hereby make application for permission to apply for suspension of deportation.

An independent investigation has been conducted of your petitioner on his application for a waiver of the grounds of excludability, which resulted in the decision of the special inquiry officer dated June 30, 1959. There was introduced in evidence in said proceedings an independent character investigation conducted by the Service, all of which was favorable to petitioner and his wife.

[fol. 46] Your petitioner verily believes that he qualifies for a non-quota immigrant status. He has received his education here. His immediate family and all colateral relatives reside in the United States. If the grounds of excludability be waived he would become eligible for the issuance of an immigration visa. Your petitioner herein does not specify the exact nature of and the factual situation surrounding the suggested grounds of inadmissibility, as he is not acquainted therewith and does not have full knowledge thereof, but believes as indicated by the special inquiry officer in the last cited and dated decision:

"* * * that the evidence of record, including the independent investigation conducted by this Service, satisfactorily establishes that the applicant has successfully reformed and genuinely rehabilitated himself; and that the applicant's admission to the United States would not be contrary to the national welfare, safety, or security of this country.* * *"

Your petitioner desires to note that he made a complete statement to the special inquiry officer concerning the instance in Genoa, Italy, in 1950 of his arrest, for the special inquiry officer noted in his opinion:

"The applicant admitted that in 1950 in Genoa, Italy, he and several others who were sharing an apartment were arrested because one of the persons was suspected of unauthorized possession of a drug."

The notification of your petitioner's deportation from the United States within a period of five days, without any previous advice that the Department intended to effect his deportation, in light of your petitioner's business, obligations, family ties, etc., is of such short notice and duration that if petitioner is compelled to depart it would deprive him of his property, would not permit a liquidation of his assets, or a fulfilment of his [fol. 47] financial obligations, and, in effect, would deprive him of due process of law.

Your petitioner is not a newcomer to the United States. His roots, ties, relatives, family and business and affairs are all grounded in the United States. Nothing can be more cruel and inhuman than to separate him from and deprive him of his wife, children and grandchildren—from all of those who are close and dear to him.

WHEREFORE, petitioner prays:

(1) For a hearing before a special inquiry officer for the purpose of:

(a) Establishing the validity of the denial of his visa application under Section 212(a)(23); and or

(b) For an order waiving such grounds of inadmissibility under Section 5 of the Act of September 11, 1957, as amended.

(2) For permission to apply for suspension of deportation.

(3) For a stay of deportation on the grounds of unusual and extreme hardship, which would accrue and result to your petitioner and his family.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on May 24, 1961, at Los Angeles, California.

/s/ Filippo Giova
FILIPPO GIOVA

/s/ David C. Marcus
DAVID C. MARCUS
215 West Fifth Street
Los Angeles, California
MAdison 8 4987
Attorney for Petitioner

fol. 48] UNITED STATES GOVERNMENT
MEMORANDUM

A-5 206 525
DATE: May 26, 1961

TO: Chairman, Board of Immigration Appeals, Washington 25, D. C.

FROM: George K. Rosenberg, District Director, Los Angeles, California

SUBJECT: Filippo *GIOVA*, also known as Philip GIOVA and Philip CALEO—Deportation Proceedings—Motion to Reopen

The attached Motion to Reopen is not filed in compliance with 8 CFR 3.8 in that it states no new facts to be proven, nor is it supported by affidavits or other evidentiary material.

The statement contained in the motion itself and the record of proceedings before this Service establish that the respondent is statutorily ineligible for suspension of deportation which is one of the grounds urged as a basis for the petition to Reopen. The very nature of the charge establishes that the respondent must qualify for suspension of deportation, if at all, under the provisions of Section 244 (a)(4), or Section 244 (a)(5). One of the provisions, among others, in those sections of the Immigration and Nationality Act, is the requirement of at least ten years continued physical presence in the United States. It is uncontested that the last entry into the United States of the respondent was on or about December 27, 1954 and he therefore cannot establish the requisite physical presence in the United States.

With reference to the petition for reopening, in order to apply for a waiver of grounds of excludability under Section 5 of the Act of September 11, 1957, the record reflects that such application has been made, considered and was granted. However, the petition to reopen does, in and of itself, establish the respondent was found inadmissible to the United States because of inadmissibility

under Section 212 (a)(23) of the Immigration and Nationality Act. The provisions of Section 5 cannot validly waive that grounds of excludability.

The petition for reopening on the basis of the respondent's request that the validity of the denial of his visa application be tested in reopened deportation proceedings is an invalid grounds for reopening the proceedings inasmuch as the authority of the Immigration and Nationality Service or the Board of Immigration Appeals does not extend to a test of the validity of a denial of a [fol. 49] visa by State Department authorities. For the above stated reasons, it is recommended that the petition to reopen in this case be denied.

/s/ George K. Rosenberg

[fol. 50] UNITED STATES DEPARTMENT
OF JUSTICE
Board of Immigration Appeals

June 12, 1961

File: A-5206525 - Los Angeles

In re: FILIPPO GIOVA aka PHILIP GIOVA and PHILIP CALEO

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: David C. Marcus, Esquire 215 West Fifth Street, Los Angeles, California

CHARGES:

Order: Section 242(f), I&N Act—Unlawfully reentered after deportation on criminal ground (8 USC 1252(f))
Lodged: None

APPLICATION: Reopening

This case comes forward pursuant to the respondent's motion submitted at the Los Angeles, California office of the Service on May 25, 1961, requesting that the proceedings be reopened for the purpose of affording the respondent an opportunity to apply for and prosecute applications for a waiver of excludability under Section 5 of the Act of September 11, 1957 and for suspension of deportation under Section 244(a) of the Immigration and Nationality Act. Counsel urged a reopening of the proceedings for the purpose of testing or establishing the validity of the denial of the respondent's application for an immigrant visa under Section 212(a)(23) of the Immigration and Nationality Act. Counsel urged that the respondent's deportation be stayed inasmuch as unusual and extreme hardship would result to his family.

The respondent, a 48-year-old married male, native and citizen of Italy, has resided continuously in the United

States since last entering at Blaine, Washington on or [fol. 51] about December 27, 1954. The record reflects that the respondent resided continuously in the United States from the date of his initial entry in 1920 until he was deported therefrom on June 8, 1946 on the ground that he had been twice sentenced to imprisonment for a term of one year or more for conviction in California of crimes involving moral turpitude, to wit, robbery, second degree, and forgery on July 15, 1935 and April 15, 1938, respectively. The respondent has never been granted permission to reapply for admission after arrest and deportation. The facts detailing the respondent's reentering the United States as a stowaway on November 7, 1948 and his deportation therefrom to Italy on January 21, 1949 as well as his reentering the United States surreptitiously from Mexico in September 1952 and his deportation therefrom to Canada in 1953 have been fully and adequately discussed in prior determinations and need no further discussion herein. When this case was last before this Board on September 16, 1957, we dismissed the appeal from an order entered by the special inquiry officer on April 2, 1957, directing that the respondent be deported from the United States pursuant to law under the previous order of deportation dated February 16, 1940 in accordance with Section 242 (f) of the Immigration and Nationality Act.

The present motion presents no facts not heretofore fully considered by the Service and this Board in prior determinations. Moreover, the motion states no new facts to be proved and it is not supported by affidavits or other evidentiary material as required by the regulations (8 CFR 3.8). On the basis of the evidence present in this record the respondent is ineligible for suspension of deportation under any of the several paragraphs of Section 244(a) of the Immigration and Nationality Act. There is no merit to counsel's request that the proceedings be reopened for the purpose of testing the validity of the denial of the respondent's application for an immigrant visa by the United States Consul at Vancouver, Canada under the provisions of Section 212(a)(23) of the Immi-

gration and Nationality Act, inasmuch as the issuance or the denial of an immigrant visa to an alien is a matter entirely within the jurisdiction of United States Department of State Consular officers. The question of granting the respondent a stay of deportation is a matter solely for administrative consideration and determination by the Service.

[fol. 52] After carefully considering all the evidence of record, together with counsel's representations by brief on motion, we find nothing therein that would justify the reopening of the proceedings for the purposes requested. Accordingly, the following order will be entered.

ORDER: It is ordered that the motion be denied.

/s/ Thos. G. Finucane
Chairman

[fol. 53] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—June 8, 1962

[Omitted in printing]

[fol. 54] MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—June 15, 1962

[Omitted in printing]

[fol. 55] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17,655

FILIPPO GIOVA, aka PHILIP GIOVA and aka PHILIP CALEO, PETITIONER

vs.

GEORGE K. ROSENBERG, District Director of Immigration and Naturalization Service at Los Angeles, California, RESPONDENT

Petition to Review an Order of Deportation

OPINION—June 15, 1962

Before: CHAMBERS, STEPHENS and BARNES, Circuit Judges.

PER CURIAM:

This court's jurisdiction is here invoked under the provisions of Public Law 87-301 (75 Stat. 650), 8 U.S.C. § 1105(a), effective September 26, 1961, which provides for "the judicial review of all final orders of deportation."

The sole deportation order presently outstanding with respect to this petitioner was made April 2, 1957. On September 15, 1957 the Board of Immigration Appeals dismissed petitioner's appeal from that order. The deportation order referred to above is still in full force and effect, and the record before us indicates it has never been revoked.

Petitioner did move to reopen the proceedings before the Board of Immigration Appeals. This request was denied November 3, 1961. Petitioner is now appealing directly to this court from the denial of his motion to reopen; not from the order of deportation.

[fol. 56] We have no jurisdiction to hear this appeal. It is dismissed.

We are tempted to discuss the merits of this case. But we cannot reach the rationale behind *Pino* v. *Nicolls*, 1 Cir. 1954, 215 F.2d 237 at 243, *reversed per curiam*, *Pino* v. *Landon*, 1955, 349 U.S. 901, or the effect of the Attorney General's holdings in the Matter of A....., 6 I. & N. Dec. 429; Matter of B....., 7 I. & N. Dec. 166; In the Matter of G....., 5 I. & N. Dec. 129, for this court cannot give advisory opinions.

[File Endorsement Omitted]

[fol. 57] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17655

FILIPPO GIOVA, also known as PHILIP GIOVA and aka PHILIP GALEO, PETITIONER

vs.

GEORGE K. ROSENBERG, District Director of Immigration and Naturalization Service at Los Angeles, California, RESPONDENT

JUDGMENT—Filed and entered: June 15, 1962.

Upon Petition to Review an order of the Immigration and Naturalization Service

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the petition to review an order of the said Immigration and Naturalization Service in this Cause be, and hereby is dismissed.

[fol. 58] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: CHAMBERS, STEPHENS and BARNES, Circuit Judges.

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—October 23, 1962.

On consideration thereof, and by direction of the Court,

IT IS ORDERED that the petition of appellant, filed August 15, 1962, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of above cause be, and hereby is denied.

[fol. 59]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 60] SUPREME COURT OF THE UNITED STATES

No. 15 Misc., October Term, 1963

FILIPPO GIOVA, ETC., PETITIONER

vs.

GEORGE K. ROSENBERG, District Director of Immigration and Naturalization Service, Los Angeles

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—January 6, 1964

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 727 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 729240 903

LE COPY

PETITION NOT PRINTED

Office-Supreme Court, U.S.
FILED
SEP 16 1964
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 23

FILIPPO GIOVA, ETC.,

Petitioner,

vs.

GEORGE K. ROSENBERG, District Director of Immigration & Naturalization Service, Los Angeles,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 23

FILIPPO GIOVA, a/k/a PHILLIP GIOVA and a/k/a PHILLIP CALEO,

Petitioner,

vs.

GEORGE K. ROSENBERG, District Director of Immigration & Naturalization Service, Los Angeles,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

Statement of the Case

Petitioner was born on April 20, 1913 at Bari, Italy; entered the United States lawfully in the year 1920 when approximately 6 years of age, and has lived and resided in the United States since said entry except for the periods mentioned in this petition. Petitioner is now 49 years of

age, attended elementary and junior high school in the City of Los Angeles, and was married to Lena Smalding, a native born citizen of the United States, on July 2, 1933. Of this marriage three children were born, all citizens of the United States. Petitioner is the grandfather of six native born citizens of the United States. Petitioner and his wife have lived and resided together as husband and wife in the City of Los Angeles, except for the periods of separation as a result of petitioner's deportation from the United States as hereinafter detailed.

On June 8, 1946 petitioner was deported from the United States on the grounds that he had been twice sentenced for a term of one year or more for conviction in California of crimes involving moral turpitude, to wit: second degree robbery on July 15, 1935, and forgery on April 15, 1938, both of which sentences were served concurrently.

On November 7, 1948 petitioner reentered the United States as a stowaway and was excluded and deported therefrom on June 21, 1949. On October 21, 1952 petitioner reentered the United States at San Ysidro, California, and was deported from the United States in January of 1953. Petitioner reentered the United States and has resided therein since December 24, 1954, with his family, children and grand-children.

On April 2, 1957, petitioner was ordered deported from the United States under the provisions of section 242(f) of the Immigration and Nationality Act.

On June 30, 1959, plaintiff was granted a waiver of grounds of excludability under section 5 of the Act of September 11, 1957.

The District Director of Immigration at Los Angeles approved petitioner's application for advance permission

to reapply for admission to the United States after deportation on June 16, 1959, and on July 27, 1959 amended his order of June 16, 1959, as follows:

"Advance permission to reapply after deportation is granted following departure to Canada under an order of deportation and return under preexamination proceedings approximately in August, 1959."

On June 30, 1959, in a decision rendered by the special inquiry officer of the Immigration Service, it was determined:

"* * * that the evidence of record, including the independent investigation conducted by the Service, satisfactorily establishes that the applicant has successfully reformed and genuinely rehabilitated himself and that the applicant's admission to the United States would not be contrary to the national welfare, safety or security of this country. In the premises, a waiver of the ground of excludability is warranted, and, accordingly, consent will be granted the applicant to apply for an immigrant visa and for admission to the United States.

"ORDER: It is ordered that pursuant to the authority contained in Section 5 of the Act of September 11, 1957, permission is granted to apply or reapply for a visa and admission to the United States, notwithstanding his inadmissibility under section 212(a) (9) of the Immigration and Nationality Act arising from his convictions in California of robbery, second degree (1935) and forgery (1938) PROVIDED that such waiver shall apply only to the grounds of excludability herein discussed. It is further ordered that the applicant be found admissible to the United States when in possession of 'appropriate documents'".

That upon the granting of said waiver of excludability, petitioner did make his application for a visa to the United States Consulate at Vancouver, British Columbia, and thereafter on September 9, 1959, petitioner was advised by said Consulate that:

> "You are inadmissible to the United States under the provisions of section 223(a) (23) of the Immigration and Nationality Act",

and denied petitioner's application for a visa.

That on September 25, 1961, petitioner filed with the District Director of the Immigration Service at Los Angeles, his supplemental petition (1) to reopen proceedings; (2) for waiver of grounds of excludability under Section 5 of the Act of September 11, 1957, as amended; (3) for leave to file application for suspension of deportation; and (4) for stay of deportation.

That on November 3, 1961, the Board of Immigration Appeals made and entered its order denying petitioner's petition of September 25, 1961.

Petitioner appealed directly from this order to the Ninth Circuit Court of Appeals from the denial of his motion to reopen. The appeal was taken under the provisions of Public Law 87-301 (75 Stat. 650), 8 U.S.C.A. 1105a, effective September 26, 1961.

The Respondent's Brief to the Ninth Circuit hinted at lack of jurisdiction in the following language:

> "Under Public Law 87-301, 8 U.S.C. 1105(a), the United States Court of Appeals is granted jurisdiction to review final orders of deportation. In view of the uncertainty surrounding the question as to whether or not petitioner is appealing from a final order of de-

portation, respondent contends that this Court may lack jurisdiction under 87-301 (8 U.S.C. 1105(a)) to review and decide petitioner's appeal."

After argument before the Circuit, the Court *per curiam* Opinion determined as follows:

"PER CURIAM:

This court's jurisdiction is here invoked under the provisions of Public Law 87-301 (75 Stat. 650), 8 U.S.C.A. 1105a, effective September 26, 1961, which provides for 'the judicial review of all final orders of deportation'.

The sole deportation order presently outstanding with respect to this petitioner was made April 2, 1957. On September 15, 1957 the Board of Immigration Appeals dismissed petitioner's appeal from that order. The deportation order referred to above is still in full force and effect, and the record before us indicates it has never been revoked.

Petitioner did move to reopen the proceedings before the Board of Immigration Appeals. This request was denied November 3, 1961. Petitioner is now appealing directly to this Court from the denial of his motion to reopen; not from the order of deportation.

"(1) *We have no jurisdiction to hear this appeal. It is dismissed.*

"(2) We are tempted to discuss the merits of this case. But we cannot reach the rationale behind *Pino* v. *Nicolls*, 1 Cir. 1954, 215 F.2d 237 at 243, reversed per curiam, *Pine* v. *Landon*, 1955, 349 U.S. 901, 75 S.Ct. 576, 99 L.Ed. 1239, or the effect of the Attorney General's holdings in the Matter of A - - - -, 7 I. & N. Dec. 166; In the Matter of G - - - -, 5 I. & N. Dec. 129, for this court cannot give advisory opinions."

Statutes Involved

Public Law 87-301 (75 Stat. 650), 8 U.S.C.A. 1105a, effective September 26, 1961.

Section 1105a as amended by Public Law 87-301 (75 Stat. 650), 8 U.S.C.A. in part provides:

> "(a) The procedure prescribed by, and all the provisions of sections 1031-1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, . . ."

and

> "(c) . . . No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceedings, unless the petition presents grounds which the Court finds could not have been presented in such prior proceedings, or the Court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order."

QUESTION INVOLVED

The Sole Question Involved Is Whether a Refusal by the Attorney General to Consider Petitioner's (1) Application for Discretionary Relief to Permit the Filing of an Application for Suspension of Deportation; (2) Application to Reopen the Immigration Proceedings, (3) Waiver of Grounds of Excludability Under Section V of the Act of September 11, 1957, as Amended, and (4) for Stay of Deportation, After a Final Order of Deportation Has Been Entered—Is Reviewable Within the Jurisdiction of the Courts of Appeals or the District Courts of the United States.

Contention of the Petitioner

It is the petitioner's contention that the Circuit Courts of Appeals have exclusive jurisdiction to review orders by the Attorney General made subsequent to the entry of the final Order of Deportation.

Argument and Points and Authorities

The issue involved is solely one relating to the jurisdiction of the United States Courts, whether the review must be initially held before the Circuit or the District Courts. The merits of petition are not presented to this Court, nor are we concerned with the petitioner's deportability, since this question was determined many years ago.

It is our considered opinion that the instant matter comes within the ruling of this Court in *Foti* v. *Immigration Service*, 11 L.Ed. 2nd 281, the sole difference being that in *Foti*, the relief by the admittedly deportable alien was initiated during the deportation proceedings.

Giova filed his petition for discretionary relief subsequent to a final determination of his deportability and

the entry of the final Order of Deportation. The distinction between *Foti* and *Giova* is without substance. They are identical in that each is for a review from the denial of discretionary relief by admittedly deportable aliens.

The Immigration Service and the Board of Appeals had jurisdiction, in each instance, to consider the applications for discretionary relief. Having denied in each the relief sought, *Foti* determined that the Circuit Courts had exclusive jurisdiction by judicial review to determine deportability and denial of discretionary relief, and was within the ambit of Section 106(a). Giova's petition for judicial revew was denied by the Circuit on the grounds it had no jurisdiction. The Immigration Department had jurisdiction to hear and determine the requested discretionary relief in *Foti* and *Giova*. Judicial review as sought by Foti within the posture of the entire deportation proceedings, though not contesting his deportability, was held to be solely cognizable in review before the Circuit. It therefore follows as a necessary corollary in *Giova* that the Circuit had jurisdiction to determine the denial of discretionary relief made after the entry of the final Order of Deportation.

Giova's deportability is not in issue. However, if he be granted the discretionary relief prayed, it would affect the final Order of Deportation, for if the suspension of deportation be granted, the Order of Deportation would become moot. Consequently, a favorable determination of his petition for suspension of deportation would directly affect the Order of Deportation. Can it be said, with any degree of reasoning or logic, where judicial review is sought on the question of deportability and a denial of discretionary relief that judicial review must be sought from the Circuits on deportability and review before the

District Courts on the denial of discretionary relief? Such bifurcated proceedings would obviously be contrary to the intent of Congress in enacting §106a of the Immigration and Nationality Act. The basic purpose of this Section was to obviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts.

Foti determined:

"Review of the denial of discretionary relief is ancillary to the deportability issue, and both determinations *should therefore be made by the same court at the same time.* We realize that deportability is conceded in a large number of cases. But this fact hardly detracts from our view as to a proper interpretation of 106(a).

"In substance, we feel that the Court of Appeals was wrong in limiting the phrase 'final orders of deportation' in 106(a) to adjudications of deportability..."

and

"Also, it seems rather clear that all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to 244(e) and orders denying the withholding of deportation under 243(h), are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals under 106(a). We see nothing anomalous about the fact that a change in the administrative regulations may effectively broaden or narrow the

scope of review available in the Courts of Appeals. Furthermore, we do not regard it 'in the last degree unlikely' that Congress intended a court of three judges to initially review discretionary determinations denying suspension of deportation. Much of the litigation in deportation cases with respect to the setting aside of an administrative determination on the ground of arbitrariness involves disputed eligibility questions and matters of statutory construction. Additionally, the concern of the court below does not comport with the declared purpose of 106(a) to eliminate the District Court stage of the judicial review process in an effort to prevent dilatory tactics. *And the suggestion of the court below that it is 'incredible' that Congress meant to burden the Courts of Appeals with review of all orders denying discretionary relief in deportation cases is unconvincing.* Congress presumably realized that, in practical effect, those engaged in dilatory tactics would hardly hesitate to appeal to a Court of Appeals from an adverse District Court determination where discretionary relief had been denied in the administrative proceeding."

We respectfully urge that the holding by the Ninth Circuit that it was without jurisdiction to review the orders in this case was error.

Included within the purview of deportation proceedings are many related matters dealing with discretionary relief, voluntary departure privileges, Section 244(e); orders denying and withholding deportation under Section 243(h), hardship cases, and (3) orders denying applications for preference in immigration visas by concededly deportable aliens against whom final orders of deportation are outstanding.

Can it be said that the denial of any form of discretionary relief sought by the alien must be separately determined by the District Court from a determination by the Circuit on review of the Order of Deportation where such order is contested. In the footnote of *Foti* v. *Immigration Service*, we find the following pertinent language:

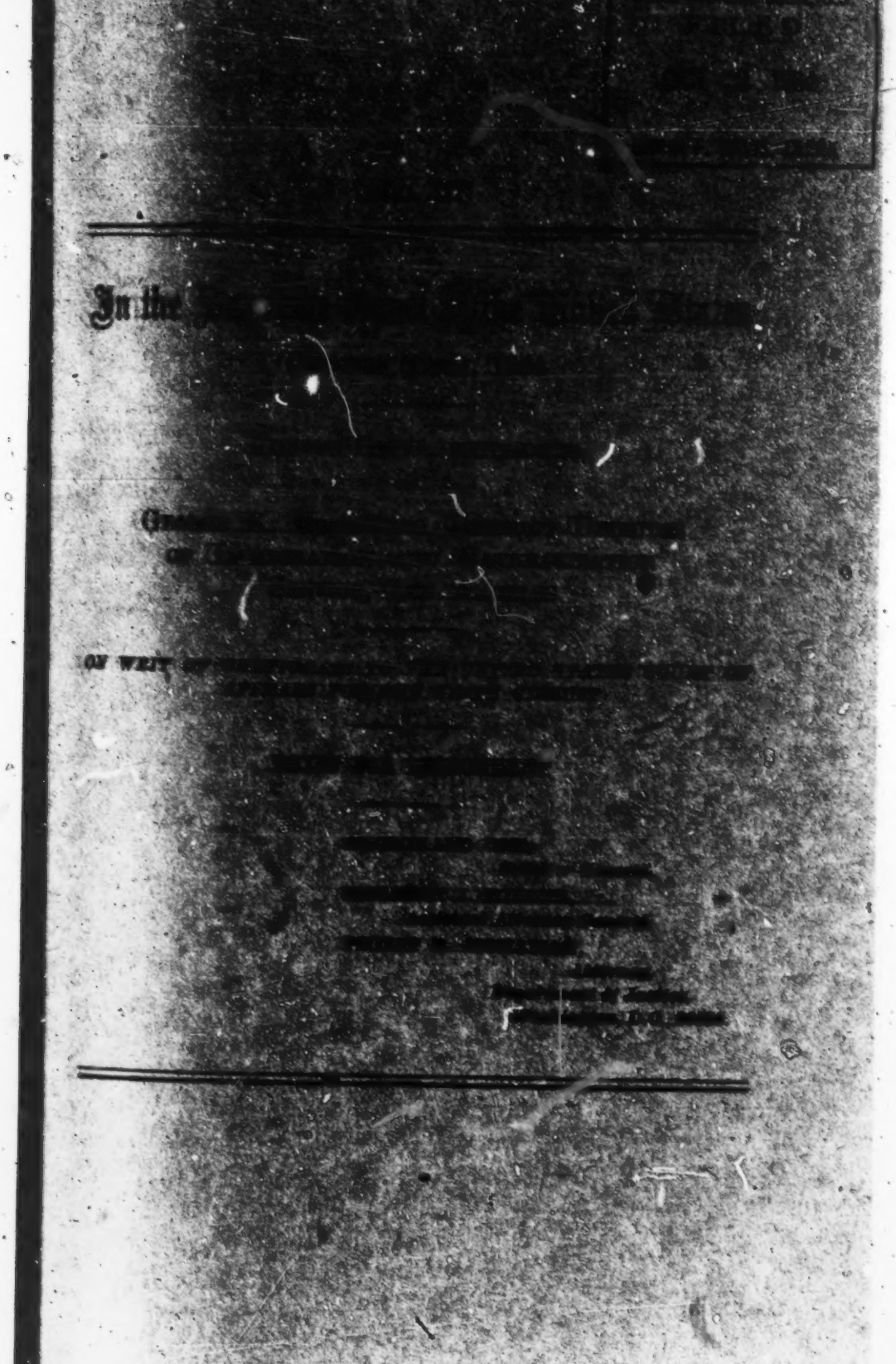
> "18. The court below manifested its concern that, if it were to find that it had jurisdiction in this case, the door would then be opened to the obtaining of review of a refusal to reopen a deportation proceeding in the Courts of Appeals. 308 F.2d, at 785. And the Government has argued in its brief that, although the question is a close one, an order refusing to reopen a deportation proceeding should be regarded as within the provisions of 106(a) with respect to judicial review in the Courts of Appeals, though occurring subsequent to the issuance of a final deportation order. Brief for respondent, pp. 51-56. Compare Giova v. Rosenberg, 308 F.2d 347 (C.A. 9th Cir. 1962), petition for cert. pending, No. 15 Misc. October Term, 1963. Cf. Dentico v. Immigration and Naturalization Service, 303 F.2d 137 (C.A. 2d Cir. 1962), holding that Courts of Appeals have exclusive jurisdiction to review denials of motions to reopen deportation proceedings, where review of a final order of deportation is sought at the same time."

We believe what has been said in this Court's Opinion in *Foti* is applicable to the instant proceedings, and shall not burden this Court with further argument.

We respectfully request reversal.

Respectfully submitted,

DAVID C. MARCUS,
Attorney for Phillip Giova



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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 23

FILIPPO GIOVA, PETITIONER

v.

GEORGE K. ROSENBERG, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 52–53) is reported at 308 F. 2d 347.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1962 (R. 54), and a petition for rehearing was denied on October 23, 19[illegible] (R. 55). The petition for a writ of certiorari was filed on January 5, 1963, and granted on January 6, 1964 (R. 56; 375 U.S. 964). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (Supp. V) 1105a(a), vesting in the courts of appeals exclusive jurisdiction to review "all final orders of deportation," applies to an order of the Board of Immigration Appeals refusing to reopen a deportation proceeding following the entry of an order of deportation.

STATUTE AND REGULATIONS INVOLVED

Section 106 of the Immigration and Nationality Act, as added by Section 5(a) of Public Law 87-301, approved September 26, 1961, 75 Stat. 651 (8 U.S.C. (Supp. V) 1105a), and the relevant provisions of Parts 3 and 242 of Title 8 of the Code of Federal Regulations as they read at the time of the enactment of Section 106 appear in the Appendix, *infra*, pp. 22–31.

STATEMENT

On September 16, 1957, an order of deportation, entered against petitioner by a special inquiry officer on April 2, 1957, became administratively final upon the dismissal of an appeal therefrom by the Board of Immigration Appeals (R. 26–27, 28–30). On November 3, 1961, following further administrative proceedings, the Board denied a supplemental motion by petitioner, filed September 25, 1961, to reopen the deportation proceedings (R. 16–19, 20–23). On November 30, 1961, petitioner filed in the United States Court of Appeals for the Ninth Circuit, pursuant to Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (Supp. V) 1105a(a) (Appendix, *infra*,

pp. 22–25), a petition for review of the Board's November 3 order (R. 1–6).[1] On June 15, 1962, the court of appeals dismissed the petition for lack of jurisdiction—on the ground that the order sought to be reviewed was not a "final order of deportation" within the meaning of Section 106(a) (R. 52–53).

The relevant facts are as follows:

1. Petitioner, a 51-year-old alien, a native and citizen of Italy, first entered the United States in 1920 at the age of 6 or 7 (R. 20, 24, 28, 50). He is the husband of a native-born citizen of the United States, whom he married in 1933, and the father of her three citizen children, all now adults (R. 2, 18, 25). On February 16, 1940,[2] in the first of a series of expulsion directives which have been entered against him, petitioner was ordered deported on the ground (see 39 Stat. 889, now § 241(a)(4) of the Immigration and

[1] The petition for review named as respondent George K. Rosenberg, the District Director of the Immigration and Naturalization Service at Los Angeles. Technically, the action should have been against the Immigration and Naturalization Service (see Section 106(a)(3), 8 U.S.C. (Supp. V) 1105a(a)(3) (Appendix, *infra*, p. 23)). So far as appears, the error was not called to the attention of the court of appeals, whose opinion and judgment, consequently, were styled in the same manner as the petition (R. 52–53, 54). The caption has been continued in the proceedings in this Court. While the point is of no substantive importance, we call it to the Court's attention at this time with the suggestion that an order be entered, prior to or contemporaneously with the Court's decision and opinion, changing the style of the case to conform with the directive of Section 106(a)(3), *supra*. Cf. *Fong* v. *Immigration and Naturalization Service*, 308 F. 2d 191, 192 (n. 2), 196 (C.A. 9); *Talavera* v. *Pederson*, 334 F. 2d 52, 56 (C.A. 6).

[2] The date "1960" appearing in the printed copy of the order (R. 24) is a misprint.

Nationality Act, 8 U.S.C. 1251(a)(4)) that he had been twice sentenced to imprisonment for one year or more—in California, in 1935 and 1938, respectively—for crimes involving moral turpitude, to wit, robbery and forgery (R. 24–25). On June 8, 1946, following his release from imprisonment under the foregoing sentences in 1941 and further proceedings which it is unnecessary to detail, he was duly deported to Italy (R. 20–21, 25, 28, 50; A.R.[3] 77, 122–132).

On November 7, 1948, petitioner attempted to reenter the United States at the port of New York as a stowaway; he was detected, excluded, and, on January 21, 1949, again deported (R. 21, 35, 50; A.R. 114–116). In September or October 1952, he reentered this country surreptitiously from Mexico at San Ysidro, California (R. 21, 35, 50), and on January 30, 1953, following a hearing, he was again ordered deported (R. 35; A.R. 101–102). In February 1953, while he was at liberty under bond pending execution of the last-mentioned order, he jumped bail and fled to Canada with his family (R. 35; A.R. 95–100). On or about December 24, 1954, he reentered the United States, again surreptitiously, at Blaine, Washington (R. 21; A.R. 90, 95–96). He has resided here continuously since 1954 (R. 21).

On April 2, 1957, following a hearing before a special inquiry officer, petitioner was again ordered deported (R. 26–27).[4] This order, as previously noted, became final on September 16, 1957, upon the dismissal

[3] "A.R." refers to the certified administrative record, on file in the Clerk's office.

[4] The order directed petitioner's deportation "under the previous order of deportation dated February 16, 1940, in accord-

of petitioner's appeal from it by the Board of Immigration Appeals (R. 28–30; see 8 C.F.R. §§ 3.1(d)(2) and 242.20 (Appendix, *infra*, pp. 27, 31)). Petitioner did not seek judicial review of the order, and it remains outstanding, unaffected by any of the later proceedings (summarized below).

2. Some time subsequent to the Board's order of dismissal, *supra*—the exact date does not appear from the record—petitioner initiated before the Immigration and Naturalization Service proceedings known as "preexamination" proceedings,[5] the purpose of which was to avail himself of the benefits of a 1957 statute affecting the admissibility to the United States for permanent residence of persons in his situation. Prior to September 11, 1957, an alien who, like petitioner, had been convicted of a crime involving moral turpitude was ineligible for a visa and required to be excluded from the United States. § 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9). Effective as of that date, Congress vested in the Attorney General—by Section 5 of the Act of September 11, 1957, 71 Stat. 640[6]—discretionary authority

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ance with Section 242(f) of the Immigration and Nationality Act" (R. 27). Section 242(f) (8 U.S.C. 1252(f)) provides that where an alien unlawfully reenters the United States following his deportation on any of certain enumerated grounds—including the ground here relevant—the original order of deportation is to be deemed reinstated, and the alien deported thereunder.

[5] See 8 C.F.R. (1958 rev.) Part 235a, as amended, 23 F.R. 6543, 23 F.R. 8395. Such proceedings have since been abolished (24 F.R. 6477), having been largely superseded by statutory adjustment-of-status procedures. See Gordon and Rosenfield, *Immigration Law and Procedure*, § 7.3a.

[6] Now § 212(g) of the Immigration and Nationality Act, 75 Stat. 655, 8 U.S.C. (Supp. V) 1182(h).

to admit for permanent residence any alien who, though within the excludable class referred to (among other categories designated), was the spouse, child, or parent of a United States citizen or alien lawfully admitted for permanent residence, if it was established to the Attorney General's satisfaction that (among other things) his exclusion would result in extreme hardship to the citizen or lawfully resident alien relative. On May 4, 1959, petitioner was advised that his application for the privilege of preexamination had been granted (R. 31–32); on June 16, 1959, he was given leave to apply for admission to the United States in advance of deportation (R. 34, 39); and on June 30, 1959, his application for waiver of his excludability from the United States resulting from his California convictions for robbery and forgery (see *supra*, pp. 3–4) was granted by order of a special inquiry officer following a hearing (R. 33, 35–39). This order, which was issued by the same special inquiry officer who had entered the outstanding order of deportation, directed that petitioner, notwithstanding his excludability, be found admissible to the United States "when in possession of appropriate documents" (R. 38–39). Among the documents required for this purpose was a visa, issued by a United States consular officer, admitting him to the United States (see pp. 6–7 *infra*).

On September 9, 1959, petitioner was advised by the United States Consul at Vancouver, British Columbia—to whom he had applied for a visa in accordance with the plan of the preexamination proceedings[7]—

[7] The proceedings contemplated that petitioner, if found eligible for and deserving of the relief afforded by the 1957

that he was ineligible for a visa, and inadmissible to the United States, under Section 212(a)(23) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(23) (R. 4, 42). The cited provision of the Act makes inadmissible any alien who has been convicted of violating any law or regulation relating to the illicit possession of or traffic in narcotic drugs; conviction of such an offense is not one of the grounds of exclusion which the Attorney General has been empowered to waive. The conviction referred to by the Consul—of which the special inquiry officer had been unaware (see R. 37; A.R. 69–70)—had been entered on November 21, 1952, by the Court of Appeal of Genoa, Italy (R. 7).[8]

3. On May 25, 1961—two days after he had been instructed to present himself, on May 29, ready for deportation, at the Los Angeles Office of the Immigration and Naturalization Service—petitioner filed with the Los Angeles District Director a document denominated a "PETITION (1) TO REOPEN PROCEEDINGS; (2) FOR WAIVER OF GROUNDS OF EXCLUDABILITY UNDER SECTION 5 OF THE

Act, would apply to a United States consul in Canada for a visa authorizing him to enter the United States for permanent residence: if the application was favorably acted upon, he would enter Canada, secure his visa, and immediately reenter the United States as a permanent resident. See Gordon and Rosenfield, *Immigration Law and Procedure*, § 7.3c.

[8] Petitioner was sentenced for the offense, described as "[c]landestine commerce," to eight months' imprisonment and to pay a fine of 5667 lire (R. 7). He was apparently in the United States at the time of the entry of the judgment (see *supra*, p. 4). The events on which the conviction was based evidently occurred in Genoa in 1950 (R. 37; A.R. 70).

ACT OF SEPTEMBER 11, 1957, AS AMENDED; (3) FOR LEAVE TO FILE APPLICATION FOR SUSPENSION OF DEPORTATION; and (4) FOR STAY OF DEPORTATION" (R. 40–46). He stated in the petition that he was not aware of the exact nature of the charge and proceedings on which the United States Consul at Vancouver had based his refusal to issue him a visa, but that he believed that the facts and circumstances surrounding those proceedings did not constitute a valid basis for his exclusion (R. 43). He requested that he be granted a hearing before a special inquiry officer to determine whether the Consul's action was valid; that, if it was valid, the relevant ground of exclusion be waived by the Attorney General pursuant to Section 5 of the 1957 Act, *supra;* that, alternatively, he be granted leave to apply for suspension of deportation under Section 244 of the Immigration and Nationality Act, 8 U.S.C. 1254; and that his deportation be stayed in the interim (R. 43–46).

On May 26, 1961, the Los Angeles District Director transmitted the petition—which he described as a "Motion to Reopen"—to the Board of Immigration Appeals with a recommendation that it be denied (R. 47–48). With respect to to petitioner's request that he be granted a hearing to determine whether the Consul's action in refusing him a visa was valid, the district director stated, in his forwarding memorandum, that neither the Board's authority nor that of the Service extended to testing the validity of a denial of a visa by State Department authorities (R. 48). With respect to petitioner's request that he be granted

a waiver, pursuant to Section 5 of the 1957 Act, of his excludability under Section 212(a)(23) of the Immigration and Nationality Act (the ground of inadmissibility on which the Consul had based his action), the district director noted that that was not a ground of excludability which was subject to waiver under Section 5 (R. 47–48). And with regard to the request that the proceedings be reopened to enable petitioner to apply for suspension of deportation, the district director stated that it appeared from the motion itself, as well as from the record of the proceedings generally, that petitioner was ineligible. He explained that the charge of deportability was such that petitioner could qualify for suspension of deportation, if at all, only under the provisions of paragraph (4) or (5) of Section 244(a) of the Act; that a requirement of both paragraphs was at least ten years' continued physical presence in the United States; that it was uncontested that petitioner's last entry into the United States was in December 1954; and that he accordingly could not qualify under that test (R. 47).

On June 12, 1961, the Board denied the motion (R. 49–51). It agreed with the district director that the granting or denial of visas to aliens is a function exclusively within the jurisdiction of consular officers of the State Department (R. 50–51) and that no useful purpose would be served in reopening the proceedings to entertain an application for suspension of deportation because petitioner was ineligible for such relief under "any of the several paragraphs of Section 244(a) of the Immigration and Nationality Act" (R.

50).[9] (The Board made no specific reference to the prayer of the petition that petitioner's excludability under Section 212(a)(23) of the Act be waived.)

On September 25, 1961,[10] petitioner filed with the Los Angeles District Director a "supplemental" petition (R. 16–19)—otherwise styled in the same form as the May 25 petition (see *supra*, pp. 7–8) and incorporating the latter by reference (R. 18–19)—in which he represented to the immigration authorities that his 1952 Italian conviction, on the basis of which the United States Consul at Vancouver had refused him a visa, had been "expunged" by the court of conviction as of July 14, 1961, and all penal effects thereof extinguished, under provisions of Italian law (R. 17-18).[11] A certificate, bearing that date, by the Gen-

[9] At the time the Board wrote, Section 244(a) provided, in five numbered paragraphs, for five categories of aliens declared to be eligible for suspension of deportation. Each category had a different set of eligibility requirements, including a specified number of years, ranging from five to ten, of required continuous physical presence in the United States. The section has since been simplified and the categories reduced to two, for which the required periods of continuous physical presence are seven and ten years, respectively. Act of October 24, 1962, § 4, 76 Stat. 1247 (8 U.S.C. (Supp. V) 1254(a)).

[10] The date "1951" appearing on the face of the supplemental petition (R. 19) was a typographical error in the original document.

[11] Petitioner explained that, following his receipt of the Consul's communication of September 9, 1959, *supra*, denying him a visa, he had initiated an investigation to determine the nature of the proceedings upon which the Consul had based his action; that he was advised in the course of the investigation that he could have the record of these proceedings expunged and their penal consequences canceled; that he accordingly caused a petition to be filed with court of conviction requesting such relief; and that on the date mentioned, upon

court in which the conviction had been rendered, pronouncing the "rehabilitation" of petitioner, "for all legal purposes", was appended as an exhibit (R. 7–8, 18).[12] On the basis of this intervening action by the Italian court, petitioner renewed his request that he be granted a waiver of his excludability arising from that conviction (R. 19). He also renewed his request for permission to apply for suspension of deportation (*ibid.*).

On September 27, 1961, the district director forwarded the supplemental petition to the Board (A.R. 6–7), which denied it on November 3, 1961 (R. 20–23). Observing that the record relating to petitioner's "rehabilitation" by the Genoa court was the only matter in the new motion not previously considered, the Board held that there was no need to determine whether the order of rehabilitation had effectively expunged the conviction in question because the

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the recommendation of the District Attorney of Genoa, his petition had been granted (R. 17–18).

[12] The order of rehabilitation was apparently issued pursuant to Article 179 of the Italian Penal Code, providing, in relevant part, that "Rehabilitation i[s] granted when 5 years have elapsed from the day on which the principal punishment was executed or was in any other way extinguished, and the convicted person has given effective and constant evidence of good conduct" (R. 7, 13). (It should be noted, however, that petitioner has evidently never served any part of the prison sentence imposed in connection with his conviction (see fn. 8, *supra*, p. 7); whether the fine which was levied (see *ibid.*) has ever been paid does not appear.) The legal effect of the court's action under Italian law is unclear. Article 178 of the Penal Code states that "Rehabilitation extinguishes the accessory punishments and every other penal effect of the conviction, unless the law provides otherwise" (R. 13).

courts of the United States limit pardons and other acts in the nature of a pardon or amnesty exclusively to convictions in this country (R. 22). The Board, in addition, again noted that petitioner was ineligible for suspension of deportation, and that it would accordingly be pointless to reopen the proceedings to permit him to apply for such relief (R. 23).

The petition for review (R. 1–6), filed November 30, 1961, in the Court of Appeals for the Ninth Circuit, sought review of the November 3 order. That court dismissed the petition for want of jurisdiction upon the ground that the November 3 order was not "a final order of deportation" (R. 52–53).

SUMMARY OF ARGUMENT

I

An order refusing to reopen a deportation proceeding is so immediately associated with the final order of deportation that it should be treated as ancillary for purposes of review. The objective of Section 106(a) of the Immigration and Nationality Act, as its legislative history confirms, was to provide a single, unitary review procedure, in an appropriate court of appeals, for every litigable issue that might arise in a deportation proceeding. The denial of a motion to reopen such a proceeding presents such an issue.

II

The literal construction adopted by the court of appeals frustrates the basic purpose of Section 106(a)—the shortening of the process of judicial review of deportation orders by eliminating the previous initial step in such review, a suit in a district court—and

leads to bifurcated review of what is essentially a single proceeding. It would be no less undesirable for a refusal to reopen a deportation proceeding to be reviewable in a district court while the deportation order was being reviewed in a court of appeals than for a refusal to grant suspension of deportation to be reviewable in the one court while the adjudication of deportability was being reviewed in the other. It was precisely the fact that the Second Circuit's construction of Section 106(a) lent itself to this latter possibility that caused this Court to reject it in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217.

It is true that the decision below has not resulted in bifurcated review in this case—for the fortuitous reason that petitioner is not seeking review of the deportation order proper. But neither had bifurcation resulted in the *Foti* case under the Second Circuit's decision—for the analogous reason that Foti had not sought review of the determination of deportability, but only of the refusal to grant him discretionary relief. It was the fact that the Second Circuit's approach would often lead to fragmentation of what is essentially a unitary review proceeding which constituted the defect of the lower court's interpretation. The decision below is subject to precisely the same objection.

ARGUMENT

In our brief in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, in which the Court held that a refusal by the Attorney General to grant suspension of deportation was one of those "final orders of deportation" made directly reviewable in the courts of appeals by Section 106(a) of the Immigration and

Nationality Act, we expressed the view—in reply to an argument advanced by the lower court in support of its contrary holding in that case—that an administrative refusal to reopen a deportation proceeding, after an expulsion order had been entered and become final, was likewise within the scope of the section (Brief for Respondent, No. 28, October Term, 1963, pp. 51–54). Conceding that the question was a close one, we suggested that both the spirit of the enactment and sound principles of statutory construction justified the inclusion of such orders within the statutory language—whether the purpose of the request to reopen was to present new evidence on the issue of deportability, to apply for some form of discretionary relief, or to accomplish some other pertinent objective (*id.*, p. 52). The Court, in its opinion, adverted to the issue thus tangentially raised, but found it unnecessary to resolve it at that time (375 U.S. at 231).[13]

In the instant case the question previously considered is squarely presented. For the reasons which follow we adhere to our earlier suggestion and join with petitioner in urging reversal of the judgment dismissing the petition for review for lack of jurisdiction.[14]

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[13] The Court commented merely that "[t]he question is admittedly a somewhat different one [from the *Foti* issue], since such an administrative determination is not made during the same proceeding where deportability is determined and discretionary relief is denied" (*ibid.*).

[14] In the court below, the government did no more than raise the question of the court's jurisdiction. It neither argued the point nor expressed a view as to its proper resolution (Respondent's Opening Brief, C.A. 9, No. 17655, p. 2; see Pet. Br.

I

AN ORDER REFUSING TO REOPEN A DEPORTATION PROCEEDING IS SO IMMEDIATELY ASSOCIATED WITH THE FINAL ORDER OF DEPORTATION THAT IT SHOULD BE TREATED AS ANCILLARY FOR PURPOSES OF REVIEW

Section 106(a) makes subject to initial review by the courts of appeals "all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act * * *." *Literally*, an order denying a motion to reopen a deportation proceeding is not a "final order of deportation." The order of deportation, by hypothesis, was previously entered and permitted to become final—either through failure to appeal to the Board of Immigration Appeals or, if an appeal was taken, by the Board's refusal to disturb the order (8 C.F.R. §§ 3.1(d)(2), 242.20 (Appendix, *infra*, pp. 27, 31)). If, therefore, Section 106(a) were to be construed with absolutely literal strictness, a refusal to reopen the proceedings would fall outside it.

Considering the evident scheme and purpose of the statutory change, we believe that such a wooden reading of Section 106(a) is inappropriate. Unmistakably, the aim of that section—as its legislative history confirms (see *infra*, pp. 18–19, and pp. 24–27 of our *Foti* brief)—was to provide a single, unitary review procedure, in an appropriate court of appeals, for every litigable issue that might arise in a deportation

4-5). In this Court we joined petitioner in urging that certiorari be granted (No. 898 Misc., Oct. Term, 1962).

proceeding. The denial of a motion to reopen such a proceeding surely presents such an issue.

To be sure, we acknowledged in our *Foti* brief that certain types of orders—similar, in one respect, to denials of motions to reopen—were probably outside the coverage of Section 106(a). Administrative orders designating the country to which the respondent alien was to be expelled and orders denying temporary "withholding" of deportation under Section 243(h) of the Act (on account of anticipated physical persecution) were not within the scope of Section 106(a), we thought, prior to the 1961–1962 change in the regulations (discussed in the brief) under which such orders are now made in the deportation proceedings proper.[15] We took that position because, although the issues involved were debatable,[16]

[15] See our *Foti* brief at pp. 47–48 and fn. 30, p. 50; and see the *Foti* opinion, 375 U.S. at 230, n. 16. (Such orders, we thought, as a consequence of the change in the regulations referred to, are now subject to Section 106(a) review (Brief, pp. 49–51)—a conclusion in which the Court indicated that it concurred (375 U.S. at 229–230, incl. n. 16).)

[16] As noted in our *Foti* brief (fn. 28, pp. 48–49), the Court of Appeals for the Seventh Circuit has held that orders denying Section 243(h) relief were within the coverage of Section 106(a) under the pre-1962 regulations. *Blagaic* v. *Flagg*, 304 F. 2d 623. See, also, *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453, 454–455, certiorari denied, 371 U.S. 921, where the same court, in an even freer interpretation of Section 106(a), held the measure applicable to an administrative denial, made subsequent to the issuance of a final deportation order, and by an officer who had no part in the deportation proceeding, of a first preference immigrant visa—for the reason, the court concluded, that, had the visa been granted, it would practically have mooted the deportation order. And see *Skiftos* v. *Immigration and Naturalization Service*, 332 F. 2d 203, in

it seemed an undue strain upon the statutory language to extend it to a determination made (as both those types of order had been made prior to the change in regulations) "*subsequent to* the final deportation order, in proceedings *distinct from* the administrative proceedings under Section 242(b), by an official *other than* the special inquiry officer who presided over the deportation proceedings and issued the order of deportation" (Brief for Respondent, p. 48; emphasis in the original).

As we noted in the *Foti* brief, a refusal to reopen, like the designation of the country of deportation and a refusal to grant Section 243(h) relief under the pre-1962 practice, occurs subsequent to the final order of deportation. But a refusal to reopen is wholly unlike those orders in the other respects mentioned. The denial of a motion to reopen is made by the same officer who entered the final order of deportation—or, if the order was appealed, as here, to the Board of Immigration Appeals, then by that body, which, by its decision dismissing the appeal, in effect endorsed the deportation order and assumed responsibility for it—and is directly linked with the original proceedings out of which the deportation order arose. For these reasons it would be artificially literal, in the government's view, to attempt to dis-

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which the Seventh Circuit recently reaffirmed its holding in the *Roumeliotis* case.

The decisions of other courts, holding Section 106(a) inapplicable to the denial of Section 243(h) relief and to orders specifying the country of deportation under the pre-1962 regulations, are cited in footnotes 28 and 30 of our *Foti* brief, at pp. 48-49 and 50.

tinguish, for purposes of Section 106(a), between the final order proper and the denial of a motion to reopen the proceedings. In other words, an order declining to reopen the proceedings is so intimately and immediately associated with the principal order (the final order of deportation) that it would be pointless to require that the subsidiary directive be treated otherwise than as an adjunct of the principal order—comparable to the denial of a motion for rehearing or reconsideration.[17] So considered, it should be reviewable, the government believes, in the same forum in which the principal order would be reviewable if review of the latter were sought.

II

THE LITERAL CONSTRUCTION ADOPTED BY THE COURT OF APPEALS FRUSTRATES THE BASIC PURPOSE OF SECTION 106(a), AS DISCLOSED BY ITS LEGISLATIVE HISTORY, AND LEADS TO BIFURCATED REVIEW OF WHAT IS ESSENTIALLY A SINGLE PROCEEDING

In holding that denials of discretionary suspension of deportation are within the purview of Section 106 (a), this Court, in the *Foti* case, pointed out that the fundamental purpose behind that enactment was "to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby

[17] The regulations, significantly, treat orders of the Board granting motions to reopen and orders granting motions for reconsideration as practically indistinguishable. See 8 C.F.R. §§ 3.2, 3.8 (Appendix, *infra*, pp. 27–30). Cf. 8 C.F.R. (1958 rev., Cum. Pocket Supp. as of January 1, 1964) § 242.22 (reopening or reconsideration by special inquiry officer).

persons subject to deportation were forestalling departure by dilatory tactics in the courts" (375 U.S. at 224). The key feature of the congressional plan, the Court noted, "was the elimination of the previous initial step in obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals, subject only to the certiorari jurisdiction of this Court" (*id.* at 225). These congressional objectives would be frustrated, the Court held, by a construction requiring that a denial of discretionary relief be sought in a district court while the determination of deportability was being reviewed in a court of appeals. "Review of the denial of discretionary relief is ancillary to the deportability issue," said the Court, "and both determinations should therefore be made by the same court at the same time" (*id.* at 227). "Bifurcation of judicial review of deportation proceedings is not only inconvenient; it is clearly undesirable and not the necessary result from a fair interpretation of the pertinent statutory language" (*id.* at 232).

These considerations are equally applicable to an order denying a motion to reopen. A refusal to reopen a deportation proceeding is as truly ancillary to the deportation order in which the proceedings culminated (see *supra,* pp. 15–18) as a denial of discretionary relief is to the determination of deportability. And it would surely be no less undesirable for the refusal to reopen such a proceeding to be reviewable in a district court while the deportation order was being reviewed in a court of appeals than for a refusal to grant suspension of deportation to be reviewable in the one court while the adjudication of deportability

was being reviewed in the other. Bifurcation of the review procedure would, in short, be just as objectionable in the one situation as in the other.[18]

It is true, to be sure, that the decision below has not resulted in bifurcated review in this case—for the fortuitous reason that petitioner is not seeking review of the deportation order proper.[19] But neither had bifurcation resulted in the *Foti* case under the Second Circuit's decision—for the analogous reason that Foti had not sought review of the determination of deportability, but only of the refusal to grant him discretionary relief. It was the fact that the Second Circuit's approach would often lead to fragmentation of what is essentially a unitary review proceeding which constituted the defect of the lower court's interpreta-

[18] Since a refusal to reopen a deportation proceeding is concededly reviewable in *some* court—the issue being merely which court, the district court or the court of appeals, is the proper forum—decisions like *Securities and Exchange Commission* v. *Louisiana Public Service Commission*, 353 U.S. 368, and *Filice* v. *Celebrezze*, 319 F. 2d 443 (C.A. 9), holding the motions to reopen involved in those cases not subject to review, are inapposite.

[19] Petitioner could have sought review of the deportation order at the same time that he petitioned for review of the order refusing to reopen the proceedings. Although the deportation order became final on September 16, 1957—more than four years prior to the filing, on November 30, 1961, of the petition for review—the six months' limitations period prescribed by Section 106(a) runs "from the date of the final deportation order or from the effective date of this section, whichever is the later" (§ 106(a)(1) (Appendix, *infra*, p. 23)). The effective date of the section was October 26, 1961. (Appendix, *infra*, p. 22, fn. 1).

tion. We have pointed out that the decision below has precisely the same disability.

CONCLUSION

For the reasons stated the government respectfully submits, with petitioner, that the judgment of the court of appeals should be reversed and the cause remanded to that court with directions to entertain the petition for review.

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OCTOBER 1964.

[20] It should be noted that the construction of Section 106(a) suggested by the government does *not* permit circumvention of the six-month limitations period prescribed for the filing of petitions for review (§ 106(a)(1) (Appendix, *infra*, p. 23)). If, after entry of a final order of deportation, an alien fails to seek review of the order within six months, he cannot thereafter revive his right to review of that order merely by filing a motion to reopen the proceedings. Review under Section 106(a) of the denial of a motion to reopen is limited, in other words, under the government's interpretation, to the propriety and legality of the order of denial itself. An alien who has failed to seek timely review, under Section 106(a), of a final order of deportation proper may seek review of *that* order only in habeas corpus proceedings, after he has been taken into custody for deportation. See § 106(a)(9) (Appendix, *infra*, p. 25), and cf. § 106(c) (Appendix, *infra*, p. 26).

APPENDIX

1. Section 106 of the Immigration and Nationality Act, as added by Section 5(a) of Public Law 87-301, approved September 26, 1961, 75 Stat. 651 [1] (8 U.S.C. (Supp. V) 1105a), provides:

JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION

SEC. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.),[2] shall apply to, and shall be the sole

[1] Section 5(b) of Public Law 87-301 (75 Stat. 653) provided that the newly enacted section was to take effect on the thirtieth day after its approval—*i.e.*, on October 26, 1961—and that, irrespective of the provisions of any other law, including Section 405 of the Immigration and Nationality Act (the saving clause of that Act, 8 U.S.C. 1101, Note), the new section was to be applicable to all administrative proceedings involving the deportation or exclusion of aliens, notwithstanding (1) that the person involved may have entered the United States prior to the effective date of the new section or of the Immigration and Nationality Act, or (2) that the administrative proceeding may have been commenced or conducted prior to the effective date of the new section or of that Act. It was further provided that any judicial proceeding to review an order of deportation which was pending unheard in any district court on the effective date of the new section (with certain exceptions) was to be transferred for determination to the court of appeals having jurisdiction to review the order under the new section.

[2] The Act of December 29, 1950 (the "Hobbs" Act), as amended, provides that the courts of appeals "shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders" of cer-

and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit;

(3) the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

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tain designated federal agencies in proceedings under designated statutes (§ 2, as amended, 5 U.S.C. 1032).

(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;

(6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28, United States Code. Any such alien shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney

General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 242 of this Act;

(7) nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 242 of this Act. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 242 of this Act at any time after the issuance of a deportation order;

(8) it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 of this Act or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding; or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

2. Parts 3 and 242 of Title 8 of the Code of Federal Regulations provided in pertinent part at the time of the enactment of Section 106 of the Immigration and Nationality Act, *supra*, pp. 22–26 (September 26, 1961) (23 F.R. 9117–9119 and 22 F.R. 9797–9798, respectively):[3]

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[3] Inasmuch as the issue before the Court is essentially one of statutory construction—*i.e.*, whether Congress intended the "final orders of deportation" of which it spoke in Section 106(a) to extend to the denial of a motion to reopen a deportation proceeding—we quote the relevant provisions of the regulations in the form in which they stood when the section was enacted. Intervening changes—see the Cumulative Pocket Supplement to the 1958 Revision of Title 8, C.F.R., for the current provisions—have been mainly formal or phraseological in character. The principal relevant amendment has been the addition to Part 242—effective since January 22, 1962 (26 F.R. 12110, 12113)—of a new section (242.22) providing specifically for reopening of the proceedings before, or reconsideration of the decision by, the special inquiry officer. Similar provisions, relating to proceed-

PART 3—BOARD OF IMMIGRATION APPEALS

§ 3.1 *Board of Immigration Appeals—*

* * * * *

(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

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(2) Decisions of special inquiry officers in deportation cases, as provided in Part 242 of this chapter.

* * * * *

(d) *Powers of the Board—*

* * * * *

(2) *Finality of decision.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. * * *

* * * * *

§ 3.2 *Reopening or reconsideration.* The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reconsideration or reopening of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of

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ings before the Board of Immigration Appeals, had long previously been in the regulations (see §§ 3.2 and 3.8 of Part 3, *infra*, pp. 27–30).

a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. For the purpose of this section, any final decision made by the Commissioner prior to the effective date of the act with respect to any case within the classes of cases enumerated in § 3.1(b) (1), (2), (3), (4), or (5) shall be regarded as a decision of the Board.

* * * * *

§ 3.8 *Motion to reopen or motion to reconsider*—(a) *Form.* Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent. In any case in which a deportation order is in effect, there shall be included in the motion to reopen or reconsider such order a statement by or on behalf of the moving party declaring whether the subject of the deportation order is also the subject of any pending criminal proceeding under section 242(e) of the act, and, if so, the current status of that proceeding. If the motion to reopen or reconsider is for the purpose of seeking discretionary relief, there shall be included in the motion a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of

execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case.

(b) *Distribution of motion papers when alien is moving party.* In any case in which a motion to reopen or a motion to reconsider is made by the alien or other party affected, the three copies of the motion papers shall be submitted to the officer of the Service having administrative jurisdiction over the place where the proceedings were conducted. Such officer shall retain one copy, forward one copy to the officer of the Service who made the initial decision in the case, and submit the third copy with the case to the Board.

(c) *Distribution of motion papers when the Commissioner, or any other duly authorized officer of the Service is the moving party.* Whenever a motion to reopen or a motion to reconsider is made by the Commissioner or any other duly authorized officer of the Service, he shall cause one copy of the motion to be served upon the alien or party affected, as provided in Part 292 of this chapter, and shall cause the record in the case and one copy of the motion to be filed directly with the Board, together with proof of service upon the alien or other party affected. Such alien or party shall have a period of ten days from the date of service upon him of the motion within which he may, if he so desires, submit a brief in opposition to the motion. If such a brief is submitted, two copies thereof shall be filed directly with the Board and one copy directly with the Commissioner. The Board, in its discretion, for good cause shown may extend the time within which such brief may be submitted.

(d) *Ruling on motion.* Rulings upon motions to reopen or motions to reconsider shall be by written order. If the order directs a reopening, the record shall be returned to the officer of the Service having

administrative jurisdiction over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

* * * * *

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

* * * * *

§ 242.8 *Special inquiry officers*—(a) *Authority.* In a proceeding conducted under this part, the special inquiry officer shall have the authority to determine deportability and to make decisions including orders of deportation as provided by section 242(b) of the act, * * * to suspend deportation and authorize voluntary departure as provided by section 244 of the act, * * * and to take any other action consistent with applicable provisions of law and regulations. * * *

* * * * *

§ 242.16 *Hearing*—

* * * * *

(e) *Application for discretionary relief.* The respondent may apply during the hearing for suspension of deportation on Form I–256A, * * * or such other discretionary relief as may be appropriate to the case. * * *

* * * * *

§ 242.17 *Decision of special inquiry officer*—(a) *Contents.* * * * Except in cases where deportability is determined on the pleadings pursuant to § 242.16 (b) or (d), the decision shall include a summary of the evidence and shall set forth findings of fact and conclusions of law as to deportability. * * * The deci-

sion shall also contain a discussion of the evidence relating to the respondent's eligibility for any discretionary relief requested and the reasons for granting or denying the application. The decision shall be concluded with the order of the special inquiry officer.

* * * * *

§ 242.18 *Order of special inquiry officer.* The order of the special inquiry officer shall be that the alien be deported, or that the proceedings be terminated, or that the alien's deportation be suspended, or that the alien be granted voluntary departure at his own expense in lieu of deportation, * * * or any combination of these orders in the alternative or that such other action be taken in the proceedings as may be required for the appropriate disposition of the case.

* * * * *

§ 242.20 *Finality of order.* The order of the special inquiry officer shall be final except when the case has been certified as provided in § 6.1(c) or § 7.1(b) of this chapter, or an appeal is taken to the Board of Immigration Appeals by the respondent or by the examining officer.

* * * * *